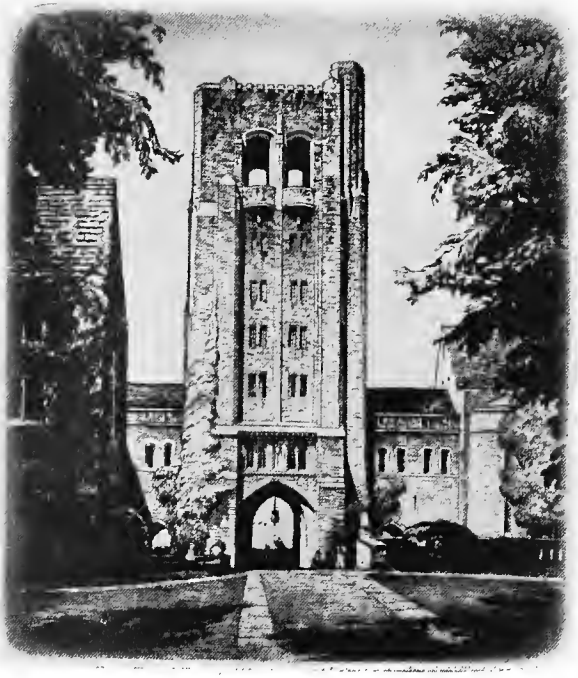

A MONOGRAPH

ON THE

LAW OF LOST WILLS.

BY

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CHICAGO:
CALLAGHAN AND COMPANY,
1890.

H. A. TAYLOR,
PRINTER AND STEREOTYPER,
MADISON, WIS.

PREFACE.

The subject of Lost Wills is one of considerable interest to the profession. Little attention has been given by authors to the subject: usually only one or two paragraphs or pages.

It has been my endeavor to supply this omission, and present a work citing all the cases on the subject, bringing out all points decided or involved in any *dicta*.

I have not hesitated to make liberal quotations from the opinions of the courts, which is probably to the profession as satisfactory a way of presenting the questions discussed as any other. I have also inserted in the appendices extracts from Coote on Probate Practice, which it is thought will aid the practitioner.

W. W. THORNTON.

INDIANAPOLIS, IND., March 29, 1890.

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[1] Erroneous citation. Should be Hale v. Monroe, 28 Md. 98.

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Schultz v. Schultz, 35 N. Y. 653. Cited, 8 Hun, 108; 50 Barb. 127; 9 Hun, 497; 110 N. Y. 486 (S. C. 18 N. E. Rep. 112); 17 Abb. N. Cas. 335 (4 Dem. 61); 1 Dem. (N. Y.) 530.
Schultz v. Schultz, 10 Gratt. 358. Cited, 64 Tex. 269, 270; 5 R. I. 121.
Sheridan v. Houghton, 6 Abb. N. Cas. 234. Cited, 1 Dem. (N. Y.) 530; 5 Redf. (N. Y.) 376.
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Stacey v. Dukins, not reported. Cited, 1 Phil. 415; 1 Lee (Eng.), 509, 512.
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Timon v. Claffy, 45 Barb. 438. Cited, 8 Hun, 108; 1 Dem. (N. Y.) 521; 66 Cal. 490 (S. C. 6 Pac. Rep. 328; 5 W. C. Rep. 756).
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Tucker v. Phipps, 3 Atk. 359. Cited, 13 Rich. 200, 202; 9 Dana, 92; 52 Geo. 161, 162 (S. C. 21 Am. Rep. 247, 248); 8 Humph. 390 (S. C. 47 Am. Dec. 626).
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Tynan v. Paschal, 27 Tex. 286. Cited, 59 Miss. 607.

Voorhees v. Voorhees, 39 N. Y. 463 (S. C. 50 Barb. 119). Cited, 8 Hun, 108; 28 W. Va. 148 (S. C. 57 Am. Rep. 654); 17 Abb. N. C. 333 (S. C. 4 Dem. 58); 1 Dem. 521.
Voorhis v. Voorhis, 50 Barb. 119 (S. C. 39 N. Y. 463). Cited, 8 Hun, 108.

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Wharram v. Wharram, 3 Sw. & Tr. 301 (S. C. 10 L. J. 163; 10 Jur. (N. S.) 499; 12 W. R. 889; 33 L. J. (P. M. & D.) 75). Cited, 3 Sw. & Tr. 446; L. R. 1 P. & D. 473, 474. Contrasted, 8 Ir. Eq. 360, 365.
Whitehead v. Jennings, not reported. Cited, 1 Phil. 412; 9 Moo. P. C. 145; 1 Lee (Eng.), 510, 511, 513.

Whiteley v. King, 17 C. B. (N. S.) 756 (S. C. 10 Jur. 1079). Cited, 13 Gr. Ch. (U. P.) 301; 45 Hun, 111; 134 Mass. 258.

Wilmot v. Talbot, 3 H. & McH. 2 (S. C. 1 Am. Dec. 374). Cited, 4 T. B. Mon. (Ky.) 428.

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LOST WILLS.

CHAPTER I.

JURISDICTION.

SEC. 1. **Introduction.**— Perhaps there is no more satisfactory way of discussing the jurisdiction of courts to establish wills and admit them to probate than by making liberal quotations from a number of decisions on the subject. The writer has adopted this method chiefly in this chapter, knowing that the profession prefer the language of the court to a résumé of or statement of the conclusions of the court. Naturally in adopting this plan there will be some objections; but this may aid somewhat in obtaining a clear view of the questions. First in order is a discussion of the jurisdiction of the English courts at as early a period as historical research throws any light upon the subject. A careful consideration of this historical view is essential to a clear understanding of the question under discussion.

SEC. 2. **Jurisdiction — Historical — Ecclesiastical court — Wills of realty and personalty.**— "It must be borne in mind that a will of personalty and a testament of lands are very different things, proven in different tribunals [in England], subject to different rules of construction, and their execution enforced by different mandates — the one controlled and executed by the common and civil law and the other by the common law; the power to make the one, existing from time immemorial, and the other, only from the passage of the statute of wills, 32 and 34 Henry VIII. Mr. Williams says, on the first page of his work on executors: 'Although from the time of the Norman Conquest

until the passing of the statute of wills, 32 and 34 Henry VIII., a subject of this realm had, generally speaking, no testamentary power over land; yet the power of making a will of personal property appears to have existed and continued from the earliest period of our law.' The probate of wills for personalty is at present of exclusive ecclesiastical jurisdiction, and how it becomes so is not difficult to ascertain; that it was not always so, we think may be satisfactorily shown. Mr. Williams, in his treatise on executors,[1] says: 'It appears to have been a subject of much controversy, whether the probate of wills was originally a matter of exclusive ecclesiastical jurisdiction; but whatever may have been the case in earlier times, it is certain that at this day the ecclesiastical court is the only court in which, except by special prescription, the validity of wills of personalty can be established or disputed.' The reason of this is, we think, obvious.

"In ancient times when a man died without making any disposition of his testable goods, the king or *parens patriæ*, having the supreme care to provide for all his subjects, seized the goods of the intestate to the intent that they would be preserved and disposed of for the burial of the deceased, the payment of his debts, to advance his wife and children, if he had any, and if not, those of his blood. The prerogative was exercised by the king through his ministers of justice, most probably in the county court, where matters of all kinds were determined.[2] No doubt at that time the probate of wills was also had in the county court; for inasmuch as the king, by virtue of his prerogative, was entitled to administer through the court the effects of all intestates, it would be required that wills should be proven in the court in order that it might be known when he was ousted of this prerogative by a will, and that no fraud should be perpetrated upon it by setting up a false and supposititious will. Afterwards the crown, in favor of the church, invested prelates with this branch of the prerogative, which

[1] Page 157 [288].

[2] Wms. Ex. 237 [401].

they so grossly abused that it became necessary to enact various statutes to compel them to disgorge the effects of intestates seized by them under this branch of the prerogative and appropriated to their own use. History informs us how jealous these prelates were at all times of the interference of the temporal courts in their affairs, and again and again involved the country in serious conflicts in asserting the right to have all matters concerning the clergy adjudicated in their own courts, or without appeal except to Rome.

"It then cannot be a matter of much doubt that after they became invested with the prerogative of administering the effects of intestates, they would do so through the spiritual courts, and that they deprived the county courts of the jurisdiction exercised previously thereon; and that they also, with a view of protecting the enjoyment of this prerogative, drew from the county courts the probate of wills, and vested it likewise in the ecclesiastical courts. The same feelings would of course at all times cause them to watch with assiduity any attempt on the part of the temporal courts to assume jurisdiction upon this subject; and hence the principle which is now so well established in England: that the ecclesiastical court is the only court in which (except by special prescription) the validity of wills of personalty can be established or disputed. But ecclesiastics had nothing to gain in the case of intestacy as to real estate; there was no administration to be granted upon it; it descended to the heir at law; and the barons of England, with their innumerable feudal prerogatives on the lands of minors, would never have submitted them to the tender care of the priests. Hence the probate of testaments of land has never been allowed to the ecclesiastical courts, but has been strictly retained by the temporal courts.

"The ecclesiastical courts have no jurisdiction over wills of land only; therefore, if they attempt to proceed in proving them by compulsion, a prohibition lies.[1] Formerly a

[1] Powell on Devises, 626.

prohibition was granted absolutely where lands and chattels were disposed of by the same will; afterwards it was granted only as to the lands. But now it does not go as to either; for where a will is concerning lands and goods, and is one entire will, it shall be proved in the spiritual court to enable the executor to sue for debts, which otherwise might be lost, and to expedite the payment of legacies, which, if it were not so, might be longer delayed, and the will consequently unperformed. Besides, as to granting prohibition *quoad* the land, it is vain; for the probate of the will for the land cannot prejudice the heir, because it is no evidence at common law, it being as to lands, *coram non judice*.[1] So much for the probate of wills and testaments in England where they are in existence and can be produced.

Sec. 3. **Lost will — Courts of equity.**—"But let us see how it is where they have been lost, or suppressed, or destroyed. It would be very clear, upon the principles already stated, that they could not be set up as to realty in the ecclesiastical courts; for this would be to permit them to do without the will what they could not do with it. But in relation to personalty the rule is different. For it is laid down by Swinburn, 'that if a testament be made in writing, and afterwards lost by some casualty; if there be two unexceptionable witnesses who did see and read the testament written, and do remember the contents thereof, these two witnesses so deposing to the tenor of the will are sufficient for the proof in form of law. In which case the court will grant probate of the will as contained in the depositions of the witnesses;'[2] and Mr. Williams says[3] 'that at this day it is quite clear that the contents or substance of a testamentary instrument may be thus established, though the instrument itself cannot be produced, upon

[1] Sir George Sand's Case, 3 Salk. 22; Habergham v. Vincent, 2 Ves. 230; Netter v. Brett, Cro. Car. 395; Wms. Ex. 216 [390].

[2] Swinb. 2 s., pt. 14, pl. 4.

[3] Page 209 [379] of his work on executors.

satisfactory proof being given that the instrument was duly made by the testator, and was not revoked by him; but where allegations of this sort are made, they must be supported by the clearest and most stringent evidence.' From these authorities it is clear that a lost, destroyed or suppressed will, for personalty, may be set up in the spiritual courts, provided a proper case be made out, upon the clearest and most stringent evidence; but do they prove that a court of chancery may not, in such case, also give relief? Most assuredly not. And though we are by no means satisfied that the court of chancery in England can give relief in such case, yet we are not prepared to say it cannot. The jurisdiction of the court in cases of a similar character is so well fixed, and it is so appropriate a tribunal for such relief, that we have no hesitation in saying that if it do not exist it is because of the jealousy entertained of the interference of that court by the ecclesiastical courts, and not because there is not a fitness of things in entertaining the jurisdiction. Indeed, we have been able to find no case in which it has been held not to exist. It is decided by that great luminary of equity learning, Lord Hardwicke, in the case of Tucker v. Phipps,[1] 'that if a will be destroyed or concealed by the executor, if it is proven plainly, a legatee may go to a court of equity for a decree upon the head of spoliation or suppression, although the general rule is to cite the executor into the ecclesiastical court.'

"Now, what is to be found in the books against this authority? The principle is well established by a train of decisions that a court of equity will not set a will aside upon the suggestion of fraud or imposition in making the will; then it is not his will, and this is a question of fact.[2] And this is all that Mr. Story is able to make out of the decisions, after an elaborate review of them in note 1 to his chapter on actual or positive fraud, in the last edition[3] of his work on equity jurisprudence. For he says: 'Whether

[1] 3 Atk. 360.

[2] Powell on Dev. 626.

[3] This opinion was written in 1847.

a court of equity could interpose and relieve against fraud practiced in obtaining a will appears to have been formerly a point of considerable doubt; in some cases we find the court of chancery distinctly asserting its jurisdiction. But since the cases of Kerrich v. Bransby[1] and Webb v. Cloverden[2] it appears to have been settled that a will cannot be set aside for fraud or imposition, because it may be set aside for that cause in the ecclesiastical court; for in such a case the *animus testandi* is wanting, and it cannot be considered as a will.' But he has produced no case which holds that a suppressed, lost or destroyed will may not be set up in a court of chancery. And indeed, although a will cannot be set aside in chancery for fraud or imposition in its procurement, yet it is laid down in Powell on Devises,[3] and well sustained by authority, 'that there is no material distinction between a court of equity taking upon itself to set aside a will on account of fraud, etc., in obtaining or making it, and its taking from the party the benefit of a will which he procured to be made on a confidence that binds the conscience of the devisee, the breach of which confidence is considered in courts of equity as fraudulent. For this is a ground of equity distinct from that over the will itself, the existence of which is not in such case controverted, as it would be were they to decide upon questions of fraud, sanity, forgery, or the like; in either of which cases it is no will. In the former case equity does not set aside the will, but decrees the devisee to hold for the benefit of the party aggrieved.' So that all the cases in which a court of chancery is prohibited from acting are where an attempt is made to set aside the will, and not to set it up. But be this as it may in relation to wills for personalty which have been lost, suppressed or destroyed, there is no question but that the court of chancery in England has the jurisdiction in such case to set up a will for realty. It cannot be set up anywhere else; it is a muniment of title, and must be

[1] 3 Bro. P. C. 358; S. C. 7 Bro. P. C. by Tomley, 437.
[2] 2 Atk. 424.
[3] Page 630.

produced on a trial at law, which cannot be done if it be not in existence. It cannot, as we have seen, be set up in the ecclesiastical courts, for they had no jurisdiction of such will, and a probate of it there is *coram non judice*. Then, if it cannot be set up in the court of chancery, the devisee must lose his land.

"It is said in Powell on Devisees[1] to be usual, where a title depends on a will, to prove it in chancery against the heir; and in the case of Haines v. Haines[2] it was held 'that where an uncle having devised his real estate to distant relations, and disinherited his nephew and heir at law, and a younger brother of the heir at law, at the funeral, snatched the will out of the hands of the executor and tore it into small pieces, and most of the pieces, particularly those wherein the devise of the lands was, were picked up and joined together again, it was decreed, on bill to have the will established, the devisees should hold and enjoy against the heir, and that he should convey, although there was no proof that the heir directed the tearing of the will.'[3] From the hasty and imperfect view of this subject, it will be seen that in England the probate of wills for personalty is confined to the ecclesiastical courts; that the probate of wills for realty is confined to the courts of law when brought forward as a muniment of title, or to the chancery court when it is sought to be proven against the heir; that where a will for personalty is lost, suppressed or destroyed, it may upon clear and stringent proof be set up in the ecclesiastical courts, and that it is doubtful whether it may not be in the chancery court. But that a will of realty which is lost, suppressed or destroyed can only be set up in the chancery court."[4]

[1] 642.

[2] 2 Vern. 441.

[3] Powell on Dev. 589.

[4] Buchanan v. Matlock, 8 Humph. 390 (1847); S. C. 47 Am. Dec. 622. This decision is quoted at length, and the doctrine of the above quotation approved, in Dower v. Seeds, 28 W. Va. 113 (1886); S. C. 57 Am. Rep. 646, and additional authorities cited. See, also, Apperson v. Cottrell, 3 Port. 51 (1836); S. C. 29 Am. Dec. 239, for short historical sketch, and where the

Sec. 4. **Court of equity — Personal and real estate wills.**— "There was under the old system of England no mode by which a will of real estate could be probated and recorded once for all. It was considered a muniment of title, and was required to be proven, and might be attacked whenever it was offered in evidence before a court. The probate court, if the will was a will of personalty as well as a will of realty, might probate it; but the probate was not noticed by the common-law courts. This was a serious defect in English jurisprudence; and to remedy this the courts of chancery in England will entertain a bill to *establish* a will of realty in favor of the devisee against the heir. The court does this under its jurisdiction to quiet titles and perpetuate testimony. But that is almost a probate, since if it be established against the heir the judgment binds his heirs and privies.[1] As to wills of personal property, this defect in the English system did not exist, and there was no call for chancery to remedy it. Probate of a will of personalty against the world, and once for all, was made in the ecclesiastical court. It was of the utmost importance to society that this should be done. The death of the owner of personal estate devoted his personalty of every description to his debts, his legatees and distributees. It was therefore necessary that it should forthwith appear whether his personal property should be distributed or go to legatees, and that his debts should be paid before it went to either. Some mode, therefore, of settling once for all whether there was a will, was a necessity. This, for reasons which are part of the history of England, fell to the ecclesiastical courts; and was performed in all its details by those courts under rules as wide and as little cramped

probate court alone was held to have jurisdiction. Other authorities on the same point are 4 Burn's Eccl. L. 291 (9th ed.); Marriot v. Marriot, Gilb. Eq. Rep. 203; S. C. 1 Strange, 666; Preface to Lee's Report; 2 Swinburn on Wills, (7th ed.), 772; Payne's Will, 4 T. B. Mon. (Ky.) 422 (1827).

[1] Citing Lovelace on Wills, 416, 417; 1 Madd. Chan. 253, and Boyse v. Rossborough, 6 H. L. Cas. 3, "where the subject is fully discussed," says the court.

by common-law narrowness as were the proceedings of equity courts. That there was a will, or that there was not, was inquired into; its precise terms were ascertained; it was spread upon a book for the registry of wills, and the court undertook the superintendence of its execution. In the doing of this it exercised powers and followed methods unknown to the common law, derived from the same source — the civil law — as the powers and methods of the court of chancery. It established lost, mutilated or destroyed wills; it set aside its own judgments, and allowed rehearings and reviews for good cause, and examined questions of fraud, accident and mistake as keenly and searchingly as did a court of chancery. Under such a system even the broad jurisdiction of chancery over fraud might well be considered unnecessary in matters within the scope of the powers of the probate court. And long since it has been settled that fraud in the procurement of a will is not within the jurisdiction of a court of equity. Whether there be or be not fraud is one of the issues settled by the probate. If there be fraud, it is no will. If the will be set up, the judgment settles the matter; and if the application to chancery be before judgment, the reply is that the ecclesiastical court is competent to settle it. And though at one time equity would interfere to redress fraud in the *probate* as it would fraud in a common-law trial, by acting personally on the parties and compelling them to go into the probate court and do rightly, yet in England that jurisdiction has rarely been exercised, and may now be said to be abandoned — the power of the probate court to grant a new trial, to search the conscience of the parties and to punish for contempt, being ample and complete.[1] But both in this country and in England this limitation of the jurisdiction of chancery over frauds has not extended so far as to deny the jurisdiction where a will has been *fraudulently destroyed.* In Tucker v. Phipps[2] Lord Hardwicke asserts

[1] "See the cases collected and the subjects discussed in Perry on Trusts, § 182."

[2] 3 Atk. 359.

the jurisdiction in the very broadest terms. The case goes upon the general jurisdiction of equity over frauds, and recognizes the right of the legatee to come into equity against the spoliation, to enforce against him the bequest of a trust. A distinction is taken between the general probate of the will, which properly pertains to the ecclesiastical court, and enforcing the title or right of the legatee; and the chancellor says that, as against the spoliator, the court would not put the legatee to the hardship of establishing the words of the will against the world by probate before the ecclesiastical court. And so far as I can find there is no decision of a case in England contrary to this. In Dalston v. Coatsworth,[1] which was for relief against the fraudulent suppression of a deed, two cases are cited by the chancellor where the court decreed the spoliator of a will to hold the bequest in trust for the legatee, though there was no probate of the will; and in Haines v. Haines[2] the same question was made and decided."[3]

Sec. 5. **Jurisdiction of probate courts.**— After having reviewed at length the jurisdiction of the English courts to set up a lost will, as elsewhere quoted, the supreme court of Tennessee, in Buchanan v. Matlock,[4] says: "We have no ecclesiastical courts; no jealousy of conflicting jurisdictions. The county courts have to a certain extent been substituted for the ecclesiastical. The probate of wills, both for the real and personal property, has been given to them by statute. But no other powers of the ecclesiastical courts have been devolved upon the county courts save those expressly given by statute. The power to receive probates of wills in existence does not necessarily confer the power to set up wills which have been lost, suppressed or destroyed; if they have it at all, they must have it in cases of wills for realty as well as personalty — a more extensive jurisdiction upon the

[1] 1 P. Wms. 731.
[2] 2 Vern. 441.
[3] Harris v. Tisereau, 52 Geo. 153 (1874); S. C. 21 Am. Rep. 242.
[4] 8 Humph. 390 (1847); S. C. 47 Am. Dec. 622.

subject than belongs to the ecclesiastical courts of England. This power, if it exists, must be by implication, for it is not expressly given. If there were no other place where a will, under such circumstances, could be set up, it would be necessary to insist upon its existence by implication; but where there is a tribunal, viz., the court of chancery, where such relief can be much more effectually given, there is no reason for insisting on it. But on the contrary, there is, in our opinion, every reason for denying it. There is no similarity between the county courts of our state and the ecclesiastical courts of England in their facilities for giving relief in such cases. The ecclesiastical courts are at all times filled with judges of the highest skill and ability; there are always in attendance the most learned doctors in the common and civil law; and a machinery is possessed by them equal perhaps to any in the world for the investigation and elucidation of doubtful and conflicting facts. Not so with our county courts; the judges are men of no skill in law, entirely disqualified, by their vocations and pursuits, from the patient and tedious investigation of facts necessary to be ascertained for the purpose of setting up a will, either for realty or personalty, which has been lost, or suppressed, or destroyed by fraud or accident.

"The jurisdiction for this purpose ought not to be vested in those tribunals. The legislature has felt this so strongly that it has taken from them the right to try an issue *devisavit vel non*. How ridiculous, then, would it be to leave with them the more difficult and important power to set up wills by parol proof, both for real and personal property? Such jurisdiction is not given by statute, and we will not give it by implication. We therefore think that in any case where a will has been lost, or destroyed, or suppressed, either by accident or fraud, that it can only be set up in a court of chancery in this state, however it may be done elsewhere."

Sec. 6. **Jurisdiction of probate courts, continued.**— After dissenting from the conclusion reached by the Ohio

supreme court,[1] that a court of chancery has no power in that state to set up a lost will, and denying that its construction of the statutes, quoted in the opinion, of that state is correct, the supreme court of Virginia concur in the conclusion reached in Buchanan v. Matlock[2] so far as it holds that chancery has such a jurisdiction, but dissents from its conclusion that a probate court has not. It says: "But if this Ohio decision can be sustained at all it is only because the Ohio statute takes from the courts of equity their power of setting up lost, suppressed or destroyed wills; and if that is the case, the decision would have no right except in Ohio, unless there was found a similar provision in the statute law of the state where this Ohio decision was relied upon as authority. It is, I suppose, also true from what is said in Gaines v. Chew[3] and Gaines v. Hennen[4] that in Louisiana a lost or destroyed will can be set up only in a court of probate. But this can have no effect in aiding us to reach a conclusion in this case on the point which we are considering, because the entire basis of the Louisiana law is variant from the basis of the law in this state. Their law is founded on the civil law; ours on the common law. And perhaps in Massachusetts[5] a lost or destroyed will can be set up only in a probate court. It is certain it can be set up in a probate court in Massachusetts.[6] But we cannot thence infer that a court of chancery has not like jurisdiction; for the jurisdiction might well be concurrent in chancery courts and courts of probate, just as courts of common law and chancery courts have concurrent jurisdiction in cases of fraud.

"As far as I have been able to ascertain there is but one case in which it was decided that a court of probate had not jurisdiction to set up and probate a will which had

[1] In Morningstar v. Selby, 15 Ohio, 345 (1845); S. C. 45 Am. Dec. 579.

[2] *Supra.*

[3] 2 How. 619 (1844).

[4] 24 How. 553 (1860).

[5] Citing Waters v. Stickney, 12 Allen, 1 (1866).

[6] Citing Clark v. Wright, 3 Pick. 67; Davis v. Sigourney, 8 Met. 487.

been lost, suppressed or destroyed, and that is the case of Buchanan v. Matlock.[1] We have seen that the probate courts may set up, and establish, and admit to probate lost, suppressed and destroyed wills, in England, Louisiana and in Massachusetts. It would seem they could hardly have held otherwise in Massachusetts, as the probate courts there may and do have juries to try an issue *devisavit vel non.* It has also been decided that probate courts may establish and probate lost, or destroyed, or suppressed wills in Kentucky,[2] in Mississippi,[3] and in Alabama.[4] These decisions are based on the ground that, when not restrained by statute law, the court of probate in any state ought, in probating wills, to have jurisdiction to probate any wills, where the ecclesiastical courts of England had such jurisdiction, and where no act of parliament conferred on them any special power to probate such will; and as these ecclesiastical courts of England have always probated lost, suppressed or destroyed wills, after having first established them by necessary proof of their due execution and acknowledgment and also proof of their contents, the probate courts in the United States would necessarily have jurisdiction to do the same unless prohibited from so doing. In Alabama, in the case of Apperson v. Cottrell,[5] the court go further and seem to consider that, as a general rule, their probate court alone has jurisdiction to set up and establish a lost or destroyed will, and a court of equity has no jurisdiction ordinarily in such case, as that court would do it by referring to a jury the issue of *devisavit vel non;* and in that state probate courts can also try by juries issues of *devisavit vel non.* But it is not denied that courts of chancery may in that state establish a lost or destroyed will, where there exist grounds of equitable jurisdiction, such as

[1] 8 Humph. 390 (1847); S. C. 47 Am. Dec. 623, 629.

[2] Citing Happy's Will, 4 Bibb, 553.

[3] Citing Graham v. O'Fallin, 3 Miss. 507.

[4] Citing Apperson v. Cottrell, 3 Port. 51; S. C. 29 Am. Dec. 239.

[5] 3 Port. 51; S. C. 29 Am. Dec. 239.

would justify the court in assuming jurisdiction in a case which, but for such grounds, could only be tried in a common-law court.

"My conclusion then is that in the various states of the Union chancery courts have, and ought to have, jurisdiction to set up and establish wills which have been lost, suppressed or destroyed, except where, by some peculiar provision of the statute law, equity courts are deprived of jurisdiction in such cases; and that probate courts have in such cases concurrent jurisdiction with the chancery courts, unless their jurisdiction is so restricted by statutory law as to clearly indicate that the legislature did not design in any case to permit them to admit to probate a lost or destroyed will. These conclusions, it seems to us, are supported not only by reason, but also by the great weight of authority." [1]

Sec. 7. **Jurisdiction in Massachusetts.**— "The jurisdiction over the probate of wills and granting administration is peculiar. It was derived from the civil law through the ecclesiastical courts of England, and was granted by the province charter to the governor and council, who appointed judges of probate in the different counties as their delegates, from whom an appeal lay to them; and this appellate power was continued in the governor and council after the establishment of the state constitution until the end of the revolution, when it was transferred to this [supreme] court, still, however, keeping the probate jurisdiction distinct from those of common law and equity. The jurisdiction of courts of probate in Massachusetts, differing in this respect from those of England and of some other states, includes wills of real estate as well as of personal property." [2]

Sec. 8. **Jurisdiction denied.**— Where the constitution of a state gave the common pleas court "common-law and chancery jurisdiction in all cases directed by law;" and in

[1] Dower v. Seeds, 28 W. Va. 113 (1836); S. C. 57 Am. Rep. 646.

[2] Waters v. Stickney, 12 Allen, 1 (1866).

another section provided that "the court of common pleas in each county shall have jurisdiction of all probate and testamentary matters, granting administration, the appointment of guardians, and such other cases as shall be prescribed by law;" and by statute it was enacted that "the court of common pleas shall have power to examine and take the proof of wills, grant letters testamentary thereon, etc., and to hear and determine all cases of probate and testamentary nature," — it was held that a court of chancery could not entertain jurisdiction to set up and establish a lost or destroyed will; for if any court had the power it was the court of common pleas, and even that was doubtful. The court said that a careful examination of the authorities "will show that a court of chancery has no inherent power, either in England or America, to establish a lost will." Again, after stating that "a decree in chancery is not the probate of a will; hence, a decree establishing a will cannot operate to give it vitality, and is utterly powerless," the court proceeds to say: "What would be the effect, if, after rendering a decree either for or against the validity of the supposed will, a real and different will should be produced? Is the litigation a bar to its probate? Does it oust the court of common pleas of jurisdiction? Might not the will then be called for be produced, be proved and admitted of record; and would it not be effectual to vest titles according to the devises and bequests of the debtor? We think it would, because the chancery proceeding would be regarded wholly *coram non judice* and void, and because the statute would enforce its production, and is express as to the effect of the probate." Again: "If we have correctly comprehended the subject there is no ground to sustain the bill. It is not framed for the purpose of a discovery in aid of a probate court. Its only basis of relief is under a supposed title, which cannot be made manifest in this court without showing the will itself, duly admitted to probate, which it seeks to have established

and which cannot be here established; and should it eve become a matter of probate, there will then be no caus for sustaining the bill, inasmuch as the remedy at law i that event will be plain and adequate."[1] After havin rendered this decision the legislature passed a statute pr viding for the probate of a will lost or destroyed "subs quent to the death" of the testator. In discussing th jurisdiction of the probate courts of that state, it was sai that such courts possess only such jurisdiction as is co ferred by statute; and the statute then in force having pr vided for the probate of a will lost or destroyed "subs quently to the death" of the testator, one lost or destroye before his death could not be probated.[2] This decisio and the preceding one have not met with favor, and hav been expressly denied as correct.

Sec. 9. **Probate court may require parol evidence subsequent will in opposition to probate of a former on** By statute it was provided that a lost will could only b established in the supreme court. In the surrogate cou a will was produced and offered for probate, and in opp sition to the probate of a part of the will there was an offe made to show that a codicil revoking the will in that pa ticular part had been executed and destroyed, and no repul lication was ever made of the part of the will it revoke It was objected that the surrogate court had no power t establish this lost codicil, nor to hear evidence touching it contents, for the purpose for which it was offered; and tha only in the supreme court could the matter be brough forth. But the court decided otherwise, saying: "Th proposition does not seem to be tenable. Undoubtedly when the object of the proceeding is to establish the los

[1] Morningstar v. Selby, 15 Ohio, 345; S. C. 45 Am. Dec. 579 (1846). In this case it was claimed that Gaines v. Chew, 2 How. 619 (1844), did not establish the right of a court of chancery to establish a will, although it professed to do so; but only the point that a bill of disco ery would lie in aid of the proceedings to probate the will in a cou of probate.

[2] Sinclair's Will, 5 Ohio St. 2 (1855).

or destroyed instrument as a valid testamentary disposition of the testator's property existing at the time of his death, the surrogate has no jurisdiction to determine that question; but under the statute the proceedings for that purpose should be taken in the supreme court. But when the issue to be determined by the surrogate is whether a written instrument propounded for probate is the last will of the testator, it follows of necessity that he has jurisdiction to inquire whether a subsequent testamentary document revoking the will in question had not been executed, even though it may have been lost or destroyed.

"The question which, above all others, the surrogate has exclusive jurisdiction to hear and determine is whether the instrument propounded is the *last* will of the decedent; and he must by implication have jurisdiction to determine all subsidiary questions involved in it. The instrument in controversy cannot be the testator's last will if a subsequent will has been executed, revoking it wholly or in part; and if the latter happened to be destroyed, and the surrogate is precluded from inquiring as to its execution, he would be compelled to declare that to be the testator's last will which confessedly was not so.

"I am supported in this view by the case of Nelson v. McGiffert,[1] which holds that upon the probate of a will the surrogate has jurisdiction and power to receive proof that such will had been revoked by a subsequent will of the testator which had been destroyed. In that case the evidence with reference to the execution of the destroyed will was closely analogous to that in this case, but there was no proof whatever as to the contents of the destroyed will, or that it contained any provisions inconsistent with or revoking the former will. And it was therefore also held that the execution of the subsequent will did not of itself revoke the prior will without proof that it contained inconsistent provisions or a revoking clause.

"The true rule seems to be that, where it is necessary to

[1] 3 Barb. Ch. 158 (1848) [S. C. 49 Am. Dec. 170].

take proof of a destroyed subsequent will for the purpose of determining whether the instrument submitted for probate was the testator's last will, the surrogate has power to hear the evidence and determine that question; but where the object of the evidence is to establish the destroyed subsequent will as a testamentary disposition of the testator's estate, valid and effectual for that purpose at the time of his death, then the surrogate is deprived of jurisdiction and resort must be had to the supreme court."[1]

Sec. 10. **Probate court's power under general statutes.**— In addition to what has already been said on the jurisdiction of probate courts, the result of other decisions may be here given. Thus, under a general statute conferring on such courts power to admit to probate wills and testaments, "with full jurisdiction of all testamentary and other matters pertaining to an orphan's court or court of probate in their respective counties," with right of trial by jury on an issue *devisavit vel non*, it was held that they had exclusive jurisdiction to set up and probate a lost, destroyed or suppressed will, and a court of chancery had none.[2] There are a number of other instances in which it is held that such courts under like statutes have this jurisdiction, without its being decided that it is exclusive.[3] There are other cases in which it is held that either a court of probate or chancery may set up such a will.[4] On the other hand there are cases in which it is held that a probate court cannot

[1] Matter of Simpson, 56 How. Pr. 125 (1878).

[2] Apperson v. Cottrell, 3 Port. 51 (1876); S. C. 29 Am. Dec. 239. To same effect is McBeth v. McBeth, 11 Ala. 596 (1847); Jaques v. Horton, 76 Ala. 238 (1884); Newell v. Homer, 120 Mass. 277 (1876); Jackson v. Jackson, 4 Mo. 210 (1835); Myers v. O'Hanlon, 13 Rich. (S. C.) 196 (1861).

[3] Foster's Will, 13 Phila. 567 (1877); S. C. 34 Leg. Int. 222; Lemon v. Reynolds, 5 Munf. 552 (1817); Dower v. Seeds, 28 W. Va. 113 (1886); S. C. 57 Am. Rep. 646. In such an instance, of course, a special statute authorizing such courts to probate lost wills is unnecessary. Tynan v. Paschal, 27 Tex. 286 (1863); S. C. 84 Am. Dec. 619; Slade v. Street, 27 Geo. 17 (1859).

[4] Dower v. Seeds, *supra;* Banks v. Booth, 6 Munf. 385 (1819); Brent v. Dold, Gilmer (Va.), 211 (1820).

probate a lost, destroyed or suppressed will unless especially authorized by a statute to do so, as we have elsewhere seen.[1]

Sec. 11. **Power of courts of chancery.**— In addition to what has been said concerning the power of a court of equity to set up such a will, a citation of other cases may be made here. To say that that court may probate a lost or destroyed will is not strictly accurate. Thus, in Tennessee it was held that chancery has the power to set up or establish a lost will, but not to probate it, nor to add to the probate; and if already probated, that court cannot disregard the probate.[2] In Wisconsin it was said: "But it is perfectly clear that a court of equity has jurisdiction of the action independently of the statute. The gravamen of the complaint is the fraud of the appellants in concealing the will or destroying it; and fraud is peculiarly within the jurisdiction of courts of equity."[3] It will be observed that this quotation does not relate to the *probate* of a will; but it is a case of fraud whereby those destroying or suppressing a will have obtained possession of property which was the plaintiff's by virtue of that unprobated will. No question of probate arose. In Vermont it was said that chancery only interferes in probate matters when probate courts are inadequate to afford relief; but in that case it was proved that the defendant suppressed the will and acted as administrator, the will never having been probated; and the court decreed payment of the legacies pursuant to the directions of the will.[4] A decision in England early in the

[1] Buchanan v. Matlock, 8 Humph. 390 (1847); S. C. 47 Am. Dec. 622; Bulkley v. Redmond, 2 Bradf. 281 (1853).

[2] Townsend v. Townsend, 4 Coldw. 70 (1867); S. C. 94 Am. Dec. 184; Morris v. Swaney, 7 Heisk. 591 (1872); Brown v. Brown, 10 Yerg. 84 (1836), It has no power to contest its validity. Buchanan v. Matlock, 8 Humph. 390 (1847); S. C. 47 Am. Dec. 622. A probate court may try the validity of the will in a contest upon an acknowledged and admitted copy. Wisener v. Maupin, 2 J. Baxt. 342.

[3] Hall v. Gilbert, 31 Wis. 691, 694 (1873).

[4] Adams v. Adams, 22 Vt. 50 1849).

last century proceeded upon the same ground. The report of the decision is that "A will having been destroyed by the brother of the disinherited heir, the devisee was decreed to hold and enjoy, and a trial was denied."[1] In another report of this case it is said that the bill was filed to establish the will, and not only was the decree as just stated, but it was ordered that the spoliator, the heir, convey the land devised to the devisee.[2] The case of Tucker v. Phipps,[3] already quoted from, proceeds upon this ground. In New York occurs a dictum in which it is said that "before the Revised Statutes the court [of chancery] had jurisdiction in a suit brought to establish a will of real estate which had been fraudulently destroyed either during the life of the testator or when he was mentally incapable of consenting. And the jurisdiction of the court is now extended by statute to the case of a will of personal estate."[4] After quoting the above language it is said in that state, in a recent case, of the jurisdiction of a court of equity: "There must, I think, have been other equities dependent upon and resulting from the establishment of the instrument to warrant the interposition of the court."[5] So in the Georgia case,[6] already quoted from at length, it was charged that an interested person suppressed a will and thereby inherited a large estate which she devised to certain persons, and her executor (of this estate, both real and personal) was proceeding to administer on the estate. A bill was filed to enjoin him and to hold him as a trustee for the devisees under the suppressed will; and this was held good on demurrer. In a more recent case in that state it was held that a court of equity would not enjoin the administration of an estate in order to give the propounder of a lost will an opportunity to test

[1] Hayne v. Hayne, 1 Dick. 18 (1702).

[2] Haines v. Haines, 2 Vern. 441 (1702).

[3] 3 Atk. 359 (1746).

[4] Bowen v. Idley, 6 Paige, 46 (1836).

[5] Everitt v. Everitt, 41 Barb. 385 (1864).

[6] Harris v. Tisereau, 52 Geo. 153 (1874); S. C. 21 Am. Rep. 242. This case does not overrule Slade v. Street, 27 Geo. 17 (1859).

the memory or the perjury of an attesting and necessary witness of the contents.[1]

Sec. 12. **United States courts.**— The courts of the United States have no original probate jurisdiction. They cannot admit a will to probate.[2] In the celebrated Gaines case it was decided that under the Louisiana law the court of probate had exclusive jurisdiction in the probate of all wills; but it was further held that while a lost will must be first set up in that court, yet a court of equity, including the federal circuit court when the other jurisdictional facts attach, can so far exercise jurisdiction as to compel those charged with its suppression, and who are made defendants in the bill, to answer touching its suppression or destruction; and it was said to be a matter of grave consideration whether the federal court could not go further and set up the will.[3] Subsequently it was held that the United States courts have jurisdiction if the statutes of the state give courts of equity of that state power to annul or revoke a will.[4] Where an action to probate a lost will was brought in a state court, on petition the case was removed to the federal circuit court and the will established; but no question as to its jurisdiction was raised, all parties apparently conceding it.[5] From these authorities it is quite clear at the present day that if a bill is filed on the equity side of a United States circuit court to *establish* a lost, suppressed or destroyed will, that court will take jurisdiction of the case; but it may not, on a petition, *probate* a will, whether lost or not, unless the proceeding to probate a lost will is removed from a state court.

Sec. 13. **Kentucky courts.**— The course of decision has not run smoothly in Kentucky. In an early case it was

[1] Mosely v. Carr, 70 Geo. 333 (1883).

[2] Fouvergne v. New Orleans, 18 How. 470 (1855).

[3] Gaines v. Chew, 2 How. 619 (1844).

[4] Fuentes v. Gaines, 92 U. S. 10 (1875).

[5] Southworth v. Adams, 11 Biss. 256 (1882), a very excellent case on the subject of lost wills.

decided that the county courts of that state, under a general power to probate wills, had jurisdiction to probate a lost will.[1] Afterwards a like result was reached, and it was said that those courts possessed all the power of the English ecclesiastical courts.[2] Still later it was decided that, without a charge of spoliation, suppression, or *other fraud*, a court of equity should not entertain jurisdiction to set up a lost will;[3] and, at any rate, if brought in that court, it must be brought in the county where the will should be recorded, which had not been done.[4] In a case earlier than either of the two last cited, it was said that the statute of that state allowing the framing of an issue *devisavit vel non* did not apply to the practice in the chancery courts of that state;[5] and one year later it was said that, "to entitle a court of equity jurisdiction to establish a lost will, some necessity for a discovery, which can be effectually obtained only in such a court, must be made to appear. If the will can be as well established in a county court, the jurisdiction of such court should be deemed exclusive, because a concurrent jurisdiction should not be assumed by a court of equity when the ordinary tribunal is perfectly competent;"[6] and it was added that, if the will sought to be established was spoliated or suppressed, equity would entertain jurisdiction of the cause. So, quite recently, it was decided in that state that courts of equity had no jurisdiction to set up a lost will, where no charge of fraud is made.[7]

[1] Happy's Will, 4 Bibb, 553 (1817).

[2] Payne's Will, 4 T. B. Mon. 422 (1827). The proposition that the probate courts of this country possess all the power and skill of the English courts was denied in Tennessee. Buchanan v. Matlock, 8 Humph. 390 (1847); S. C. 47 Am. Dec. 622.

[3] Campbell v. West, 3 B. Mon. 242 (1842).

[4] Barnes v. Edward, 17 B. Mon. 632 (1856), citing an unreported case, McCall v. Valandigham.

[5] Allison v. Allison, 7 Dana, 91 (1838).

[6] Hunt v. Hamilton, 9 Dana, 90 (1839).

[7] Abbott v. Taylor, 11 Bush, 335 (1875), citing Barnes v. Edward, 17 B. Mon. 640 (1856).

Sec. 14. **English courts.**— As we have already seen, the English ecclesiastical courts possessed full power to admit wills of personalty to probate, and to set up such a will when lost or destroyed; but over wills of realty they had no jurisdiction; and if a will contained a devise of both kinds of property, its probate was valid only relative to the personalty.[1] In case of a will of realty, only a court of chancery would establish or set it up.[2] And even in a will of personalty, where a legacy was given by a will, it was held that the legatee was not required to go into a spiritual court first, and prove the will there; he could come at once to a court of equity, which had power to set up such a will, if the will was lost, suppressed or destroyed.[3] Elsewhere we have reviewed other English cases, and enough has already been said upon the jurisdiction of the English courts.[4]

Sec. 15. **Miscellaneous.**— If a court of probate has no jurisdiction to probate a lost will, its attempt to do so is void. By a statute it was provided that the clerk of a probate court in vacation, or the court when in session, "shall have power to take the probate of wills." A subsequent section provided that courts of chancery might establish lost wills, and, when so established, might authorize a probate court to administer on the estate. A court of probate undertook to establish or probate a lost will, and afterwards a sale was made under an authority conferred by the will as probated. This sale was held void, on the ground that the court had no jurisdiction of the matter; it being also held that the clerk's duties were only ministerial.[5] A statute provided that "where any will is exhibited to be proved

[1] Buchanan v. Matlock, 8 Humph. 390 (1847); S. C. 47 Am. Dec. 622.

[2] Id.

[3] Tucker v. Phipps, 3 Atk. 359 (1746).

[4] Equity courts have no jurisdiction to try the validity of a will produced in court. Pemberton v. Pemberton, 13 Ves. Jr. 290 (1807). The will act of 1837 does not prohibit proof of a lost will, although it was once thought possible that it did. Wharram v. Wharram, 3 Sw. & Tr. 301 (1864).

[5] Waggener v. Lyles, 29 Ark. 47 (1874).

[in the county court], the court or clerk may immediately receive the proof and grant a certificate of probate; or if such will be rejected, a certificate of rejection. If any persons interested shall, within five years thereafter, appear, by his petition to the circuit court of the proper county, to contest the validity of the will proved, or pray to have a will proved that has been rejected, an issue shall be made up whether the writing produced be the will of the testator or not, which shall be tried by the court, or by a jury if either party require it." This statute was held to give the circuit court jurisdiction where an attempt to probate a lost will had been made in the county court and the petition had been rejected.[1]

Sec. 16. **Rule to be deduced from the authorities.**— In many of the states the question of jurisdiction has been settled by statutes; in a few it has not. The true rule to be deduced from all the cases is: that if a court of probate has all the power of a court of equity, or can as thoroughly try the question of the validity of the lost, destroyed or suppressed will, as effectually ascertain its contents, and can frame and call a jury to try an issue *devisavit vel non*, it has full power to set up the will, regardless of the fact that the beneficiaries under it may not receive any property by its terms, for the reason that none was left by the testator at his death; and the power of probating such a will is conferred by a general statute authorizing such court to probate wills generally. In some states, as has been stated, this jurisdiction is exclusive, whether any property was left or not; and this seems to be the better rule where the defendant is not charged with any receipt of the devised property. But in those instances where the probate courts have not this plenary power, especially where they cannot call a jury to try an issue *devisavit vel non*, they have not jurisdiction to probate the will, and resort must be had to a court of equity. So if there is any admixture of fraud, as in a case of spoliation or suppression; or in case any one,

[1] Dickey v. Malechi, 6 Mo. 177 (1839); 34 Am. Dec. 130.

whether he is benefited by the suppression or spoliation of the will or not, has received any of the property devised or its proceeds, a court of equity has power to set up or establish the will and to hold the receiptor of the property as a trustee for the devisee or legatee. And this rule is extended by many of the authorities to the case of a lost will, when no spoliation or suppression has been effected, in a case where the defendant has received some or all of the devised property or its proceeds. In case the testator left no property, and a probate court has full power to establish it, then there is no reason why a court of equity should interfere, for no one is to be held as trustee; but where the defendants have received some or all of the property devised, then there is no reason why a court of equity may not take jurisdiction, set up the will and charge them as trustees, in order to avoid a multiplicity of suits, under its general authority to set up and establish lost instruments.[1]

[1] 1 Story, Eq. Jur. §§ 81–90; 2 id. §§ 1445–1449. In addition to the authorities cited elsewhere, see Myers v. O'Hanlon, 13 Rich. (S. C.) 196 (1861); Adams v. Adams, 22 Vt. 50 (1849); Slade v. Street, 27 Geo. 17 (1859); Harris v. Tisedall, 52 Geo. 153 (1874); S. C. 21 Am. Rep. 242; Bowen v. Idley, 6 Paige, 46 (1836); Hatch v. Sigman, 1 Dem. (N. Y.) 519 (1883).

CHAPTER II.

WHEN WILL MAY BE PROVED.

SEC. 17. **Lost after death of testator.**— The question naturally arises, "Under what circumstances may a lost or absent will be proved?" If the will has been lost since the death of the testator, all the authorities agree that its contents may be proved and probated. To refuse to allow a will to be probated, though lost, would be a denial of justice. A will is no more sacred than any other written instrument conferring title to property or evidencing agreements; and there is no more reason why these instruments of everyday life may be established than a will. Even the most solemn instruments of a court of justice may be established or proved when lost or destroyed; such as the pleadings in a cause of action, an execution or a judgment. In fact there is no instrument, under proper circumstances, which may not be established or proved when it has been lost or destroyed. The cases are therefore unanimous that a will lost after the testator's death may be set up or established, and in the proper court may be probated. Thus, in the earliest case reported in this country, it was said that although there was no precedent for probating a lost will, yet the court had undoubted power to admit it to probate.[1]

SEC. 18. **Lost during life of testator.**— A far more serious question has been raised where a will is lost or destroyed before the death of the testator. In such an instance the will is provable and may be probated, unless the destruction amounts to a revocation of the will.[2] To hold

[1] Legare v. Ashe, 1 Bay (S. C.), 464 (1795); Bowen v. Idley, 1 Edw. Ch. 148 (1831); S. C. 6 Paige, 47 (1836); Dickey v. Malechi, 6 Mo. 177 (1839); S. C. 34 Am. Dec. 130.

[2] Bowen v. Idley, 1 Edw. Ch. 148 (1831); S. C. 6 Paige, 47 (1836); Gaines v. Hennen, 24 How. 553 (1860).

that it could not "would open the door to knavery and fraud, and place it in the power of the dishonest to frustrate that disposition which every man has a right to make of his own property."[1] "There can be no possible doubt as to the validity of a will or codicil executed, although it be destroyed in the life-time of the testator, if so destroyed by fraud or mistake and without his consent. And if it was not intended to be destroyed by him, and is virtually *in esse* at the time of his death, the rights of the legatees or devisees under the will cannot be changed by any loss, destruction or suppression of the testamentary paper, provided the contents thereof can be sufficiently ascertained to preserve and enforce their rights in a court of justice."[2] This is a fair proposition; but there are authorities that a will, unless it is shown to have been in existence at the death of the testator, cannot be proved in case of a mere loss. Thus in a very early case a will was cut in pieces by rats. A stranger by laying the pieces together could not make out the devise and the devisee's name, but one having knowledge of its contents could. In an action of ejectment, where the will was relied upon, it was said that if the will was gnawed before the testator's death it was not provable nor a good will; if after, it was. Under these instructions the jury found for the will.[3] But these cases are not regarded as the best considered.

Sec. 19. **Testator's knowledge of destruction.**— If the testator know that his will was lost or destroyed there is grave doubt whether it can be established or probated. In one case it is said that his knowledge is said to prevent it;[4] in another that it does not necessarily prevent it.[5] On this subject the true rule undoubtedly is that it

[1] Dickey v. Malechi, 6 Mo. 177 (1839); S. C. 34 Am. Dec. 130.

[2] Betts v. Jackson, 6 Wend. 173, 180 (1830); Trevelyan v. Trevelyan, 1 Phil. 149 (1810); Scoggins v. Turner, 98 N. C. 135 (1887); S. C. 3 S. E. Rep. 719; Steele v. Price, 5 B. Mon. 58 (1844); Idley v. Bowen, 11 Wend. 227, 232 (1833).

[3] Etheringham v. Etheringham, Aleyn, 2 (1647).

[4] Dawson v. Smith, 3 Houst. (Del.) 335 (1866).

[5] Youndt v. Youndt, 3 Grant (Pa.), 140 (1861).

can or cannot be established or probated according to th circumstances. Thus, if knowledge of the destruction wa not brought home to the testator a reasonable length c time before his death to enable him to replace it by the e: ecution of another will, and he had not full opportunity t do so,— not being sufficiently well and able to undertak its execution; or if he expressed his intention of still adhe ing to the terms of the destroyed will, however long th interval between the time of its destruction and his deatl so that it was not an unreasonable length of time, the wi ought to be established; but if he had an opportunity t replace it and did not do so, if he expressed gratification, c by words expressed his acquiescence in its destruction, i ought not to be probated or established. This the write thinks is the true rule upon this subject.

Sec. 20. **Destroyed while insane.**— A testator while ir sane cannot destroy or revoke his will so as to prevent it probate or establishment; and if he destroy the paper o which it is written it may be set up as any other lost o destroyed will.[1] Thus it has been said: "It may, howeve: be that the testator was at that time equally incompetent t revoke as he was to make a will. If so, the burning of th paper would not be a revocation, because it could not be cor sidered as done *animo revocandi*."[2] If the testator becam insane after the destruction of the will and remained s until his death, the burden of showing that he destroyed i in a lucid interval is upon those opposing its probate.[3] S the execution of a will revoking his former will, by an ir sane person, does not revoke it.[4]

Sec. 21. **Destruction not amounting to a revocation.**– So if a will is accidentally destroyed, obliterated or car

[1] Forbing v. Weber, 99 Ind. 588 (1884); Scruby v. Fordham, 1 Addams, 74 (1822); Foreman's Will, 54 Barb. 274 (1869): Apperson v. Cottrell, 3 Port. (Ala.) 51 (1836); S. C. 29 Am. Dec. 239; Timon v. Claffy, 45 Barb. 438 (1865).

[2] Idley v. Bowen, 11 Wend. 22: 232 (1833); Smith v. Wait, 4 Bark 28 (1848).

[3] Sprigge v. Sprigge, L. R. 1 I & D. 608 (1868).

[4] Smith v. Wait, *supra*.

celed, it may be probated,[1] subject to the rule heretofore stated.[2] In those jurisdictions where a will cannot be revoked by the testator's tearing it up, if he do so, and does no other act toward its revocation, it may be probated at his death.[3]

SEC. 22. **Fraudulent destruction.**— The statutes of many states provide specifically for the probate or establishment of a will which has been fraudulently destroyed in the lifetime of the testator.[4] In defining what is a fraudulent construction, it was said in Kentucky that "it is well settled that to destroy or suppress a written instrument for the purposes of hindering or defeating the rights of others, however innocent the motive, is at least a constructive fraud upon the rights of such persons."[5] In a New York case, commenting on this branch of our subject, the court of appeals said: "If the will was not in existence at the time of the testator's death, then it follows equally clear that it must have been fraudulently destroyed in his lifetime or lost. The fraud mentioned and referred to in this connection is a fraud upon the testator, by the destruction of his will, so that he should die intestate, when he intended and meant to have disposed of his estate by will, and never evinced any change of that intent. It is undeniable from the facts in the record that either this will was in existence at the time of the death of the testator, without his knowledge, consent or procurement, or accidentally lost. If so destroyed, it was done fraudulently as to him, and, in judgment of law, the legal results are the same precisely as if it had continued in existence up to the time of his death. In either contingency it was his last will and testament; and the loss or destruction, either by

[1] Beauchamp's Will, 4 T. B. Mon. 361 (1827).

[2] Sec. 19.

[3] Borlase v. Borlase, Notes of Cases, 106, 139, cited in Brunt v. Brunt, 3 P. & D. 37 (1873); S. C. 5 Moak, 530.

[4] Hatch v. Sigman, 1 Dem. 519 (1883); Bulkley v. Redmond, 2 Bradf. 281 (1853).

[5] Brookie v. Portwood, 84 Ky. 259 (1886).

accident or design, being proven, it is the duty of the court to establish it as the will of this testator."[1] If it is charged that the will was maliciously destroyed, the evidence must conform to the charge.[2] In another New York case it was said that "the fraudulent destruction of a will, as the language is used in the statute, doubtless means a fraud against an imposition practiced upon the testator, defeating his intention and purposes in respect to the disposition of his property. If a testator is imposed upon, deceived and misled, and is thus induced to destroy his own will, I do not see why this is not as much of a fraud as if committed by some one else, and why it is not a fraudulent destruction of a will as much as the execution of a new will under the same influences would be regarded as 'the fraudulent execution of a new will.' A fraud in both cases would be perpetuated through the agency and act of the testator himself. The fraud in both cases would consist in inducing the testator to make such a disposition of his property as did not conform to his real wishes and purposes."[3]

Sec. 23. **Statutes.**— The rule is that if a statute permits the probate of a lost will the propounder of it must conform to its provisions; and if he does not show a case within its provisions, although the will may be lost, he will fail. Thus in New York it is said that a will can be established only in those cases prescribed by the code: (1) when in existence at his death; (2) when fraudulently destroyed in his life-time.[4] But these statutes "should have a liberal construction in furtherance of justice and for the prevention of fraud."[5] The quotations made in the previous section are confirmatory of this statement.

[1] Schultz v. Schultz, 35 N. Y. 653 (1866).

[2] Hatch v. Sigman, *supra*. The same is true in case of a fraudulent destruction. See § 34.

[3] Voorhis v. Voorhis, 50 Barb. 119, 126 (1867); S. C. *sub nom.* Voorhees v. Voorhees, 39 N. Y. 463 (1868). See the excellent case of Timon v. Claffy, 45 Barb. 446 (1865), on this point.

[4] Hatch v. Sigman, 1 Dem. 519 (1883).

[5] Hook v. Pratt, 8 Hun, 102, 109 (1876).

SEC. 24. **Introduction as evidence of title before probate.**— In several jurisdictions the contents of an unprobated or established will can be read in evidence, especially where it is the source of title to the real estate in controversy. In most of them, however, this is not permitted; and it is said that an unprobated will is not evidence of title,[1] even in case of a lost will.[2] Whether or not the contents of a lost or destroyed will can be given in evidence before its probate or establishment depends upon the question whether a will produced can be given in evidence before its probate; if the latter can, then the former may. There are a number of instances in which this has been done, in cases of ejectment or partition, and title established under it.[3] Thus, in an action of ejectment, proof of possession in an ancestor of the plaintiff was shown. The defendant then introduced a probated will, containing a recitation that the ancestor had conveyed the land in controversy to him, and rested. The plaintiff then proved that the ancestor at the time he executed this probated will was insane, which proposition the defendant controverted by evidence; and the defendant also proved that at the time of the execution of the probated will the testator tore up a will devising the land in controversy to the defendant. The latter was successful.[4]

SEC. 25. **Holding receiptor of property as a trustee.**— There are a number of authorities which virtually hold that the contents of a lost and unprobated will can be given in evidence where the plaintiff claims title by the provisions of the will and charges the defendant with a receipt of the devised property, thus seeking to hold him as a trustee. Elsewhere it has been shown that such an action is main-

[1] Rogers v. Stevens, 8 Ind. 464 (1856).

[2] Mauck v. Melton, 64 Ind. 414 (1878).

[3] Dan v. Bowen, 4 Cow. 483 (1825); S. C. 15 Am. Dec. 354; Harris v. Harris, 26 N. Y. 433 (1863), reversing same case, but on another point, 36 Barb. 88 (1863); Etheringham v. Etheringham, Aleyn, 2 (1647).

[4] Smith v. Wait, 4 Barb. 28 (1848).

tainable in equity, and the cases on that point are authorities to support the conclusion that such evidence is admissible.[1]

Sec. 26. **Destruction by compulsion — Undue influence.** If the destruction of a will is procured by undue influence or compulsion, it may be probated or established if the evidence does not show that the testator afterwards acquiesced in its destruction or cancellation.[2] The influence, to be an undue one, need not amount to force or coercion in order to make the destruction a fraudulent one.[3]

Sec. 27. **Res adjudicata.**— Questions may have arisen whether or not an unsuccessful attempt to probate a lost will is sufficient to prevent a second attempt to probate it. In New York a question analogous to this arose. By statute it was provided that a lost will could be established in the court of chancery, and a certified copy of this decree should be sufficient to authorize its probate in the probate court. The probate of any will in the state was conclusive in the case of personalty, but only *prima facie* as to realty. Another section of the statute giving the court of chancery jurisdiction provided that no will "shall be allowed to be proved as a lost or destroyed will unless the same be proved to have been in existence at the time of the death of the testator, or be shown to have been fraudulently destroyed in the life-time of the testator; nor unless its provisions shall be clearly and distinctly proved by at least two credible witnesses; a correct copy or draft being deemed equivalent to one witness." Application was made in a court of chancery to establish a will, but the applicant failed, although he proved all the other necessary facts, except to prove "by two witnesses" the provisions of the will; nor was any draft or copy produced. Upon a finding of these facts by the referee he drew his conclusions of law "that the will

[1] Harris v. Tisereau, 53 Geo. 153 (1874); S. C. 21 Am. Rep. 242; Clarke v. Goodrun, 61 Miss. 731 (1884).

[2] Williams v. Baker, 5 Law Mag. 125 (1838).

[3] Voorhees v. Voorhees, 39 N. Y. 463 (1868).

could not be allowed to be proved as a lost or destroyed will" under the statute quoted; "and that the complaint of the plaintiff should be dismissed without costs to either party." This report became the judgment of the court, and so remained at the time the second action was brought. The action to establish the will was brought by three of the heirs of the ancestor and alleged testator against the remaining two. The second action was brought by these last heirs against the other three for a partition of the ancestor's land. In answer to this petition the three heirs set up the contents of the will, and that they were the sole devisees therein to the land in controversy. In reply these partition plaintiffs set up the attempt and failure to probate this will. This was held a good reply of *res adjudicata;* and it was further held that the statute requiring two witnesses to prove the contents of the will applied to a partition case as well as to an action to establish the will in chancery.[1]

On appeal this decision was reversed, and it was held that the statute did not apply to a case of partition. It was also further held, and this is the point sought to be brought out here, that there was no *res adjudicata* which prevented the proving of the will, the court saying: "The defendants as devisees of the real estate of John Harris, deceased, were not concluded by the judgment in the proceedings instituted under the statute to prove and establish their father's will as one fraudulently destroyed; nor was such judgment effectual against them as such devisees in establishing their title to the real estate in the action of partition. It cannot be pretended that the probate and record of a will of real estate by the supreme court under the statute has any other or different effect than the probate before the surrogate of a will not lost; and in the latter case the probate is not conclusive upon any party as to any interest in real estate. Had the defendants, who were plaintiffs in the action or proceeding to prove and establish the will as one lost or destroyed by accident or design, been successful, the judg-

[1] Harris v. Harris, 36 Barb. 88 (1861).

ment thereon would not be conclusive upon or estop the plaintiff in this action, the object of which is to divide the real estate of which John Harris died seized among those entitled thereto. And if Aaron Harris, the heir at law and plaintiff in this action, and who was the defendant in the former one, would not have been estopped by the judgment thereon had it been in favor of the defendants, the latter cannot be estopped, although they failed in that action, as estoppels when they exist at all must be mutual and bind both parties or neither. Besides, the objects sought to be attained in the two suits are entirely distinct and different. The single purpose of the former one was to make proof of a will alleged to have been lost or destroyed. And the judgment in legal effect was that there was not sufficient proof to establish the will as a record according to the provisions of the statute in relation to the probate of wills. To this extent it was conclusive. But the action did not directly involve the validity of the will as a will or devise of real estate, and no such judgment was authorized. No such judgment in terms reaching that question was given. On the contrary the record directly shows that the exclusive ground on which the judgment refusing probate proceeded was that there was a failure of statute evidence as to the contents of the will, which the court found had been made and published in due form of law to pass real and personal estate, and was fraudulently destroyed by the plaintiff in this action. I am of the opinion that the defendants were not concluded by the judgment dismissing the complaint in the proceeding to prove and establish the will, and that the facts of the case justified the legal conclusion at the special term that the plaintiff had no interest in the real estate of the testator that gave him the right to institute an action for the partition thereof." [1]

Sec. 27*a*. **Laches.**— Where thirty years had elapsed be-

[1] Harris v. Harris, 26 N. Y. 433 (1863). In those jurisdictions where the probate of a will of real estate is conclusive until set aside, the first proposition laid down in the above quotation does not apply.

tween the death of the testator and the filing of a petition for the probate of a lost will, and no reason was given for the delay, probate was denied.[1] Yet where more than forty years had intervened between the death and offer, sales under a former probated will having been made, it being shown that the petitioner, during many years of that time, was a minor, wholly ignorant of her rights under the lost will; that at her majority, and after she had acquired knowledge of her rights, she brought suit in the proper court for proving the lost will, but she was nonsuited without her fault; that she instituted suit shortly after the nonsuit in the federal courts to set up the will and enforce her rights, and the case was ordered dismissed by the supreme court of the United States, as in case of nonsuit, without a decision on the merits of the cause, and without her fault, the explanation of the petitioner was deemed satisfactory, and the will was established, the court saying: "The staleness of petitioner's suit is best answered by reference to the litigation in which the petitioner's alleged rights have been prosecuted in other forms; and we may suppose it did not become necessary to resort to the unusual proceeding of applying for the probate of a lost will until after those cases were decided. The plaintiff presents to us a *prima facie* case which entitles her to relief."[2] In this case the testator died in July, 1813; suit to establish the lost will was brought in the probate court June 18, 1834, and dismissed, as above stated, June 8, 1836. In 1836 she brought the action referred to above in the federal court, and in course of time it was dismissed, as previously stated. The petition to probate it as a lost will, upon which the decision was made as above quoted from, was commenced January 18, 1855.

Sec. 28. **Statute of limitations.**—It seems that a bill to be relieved against a fraud, perpetrated by the destruction or suppression of a will, will not lie after twenty years,

[1] Hunt v. Hamilton, 9 Dana, 90 (1839). See Holden v. Meadows, 31 Wis. 284 (1872).

[2] Gaines' Appeal, 11 La. 124 (1855); S. C. 4 Am. L. Reg. (O. S.) 364.

even though no notice of its having ever been in existence is averred.[1] Yet in another case it was said that in an action to establish a will a plea of the statute of limitations of thirty years is no bar. It is said not to be a "bill of relief;" that term not including bills asking "the aid of the court against possible future injury or to support a suit in another court of ordinary jurisdiction."[2] Such were said to be bills to perpetuate testimony, to examine witnesses *de bene esse*, bills of discovery of facts resting within the knowledge of the parties against whom they are exhibited, or the discovery of deeds, writings or other things in their custody or power. Therefore it was said that the statute requiring bills for relief to be filed within a certain time did not apply.[3] A statute providing that, where an original will is produced for probate, the time during which it has been lost, suppressed or concealed, or carried out of the state, shall not be taken as a part of the limitation provided within which wills must be probated, does not affect a pending case when the will has been fraudulently concealed by any person interested in its non-production. In such a case the statute does not begin to run until the will is discovered, if reasonable diligence has been used to discover it.[4]

Sec. 29. **Statute of frauds.**— It was once intimated that the wills act of 1837, of England, prevented the proof and probate of a lost will,[5] but the intimation contains a wrong inference concerning the construction of that act. Nor does the statute of frauds prohibit the introduction of parol evidence to prove the fact of a will having existed subsequent to the will found at the death of the alleged testator; nor does it prohibit proof of the contents any more than proof of the contents of any other lost instrument.[6]

[1] Myers v. O'Hanlon, 13 Rich. (S. C.) 196 (1861).

[2] Citing Story, Eq. Pl. 17.

[3] Everitt v. Everitt, 41 Barb. 387 (1864).

[4] Deake's Appeal, 80 Me. 51 (1888); S. C. 12 Atl. Rep. 790.

[5] Wharram v. Wharram, 3 Sw. & Tr. 301 (1864); S. C. 33 L. J. (P. & M.) 75; 10 Jur. (N. S.) 499.

[6] Helyar v. Helyar, 1 Lee, 472 (1754); Legare v. Ashe, 1 Bay (S. C.), 464 (1795).

Sec. 30. **Attempt to probate former, and proof of subsequent but lost will.**— In discussing the question of jurisdiction a quotation was made from a New York case, showing the power of a probate court, on motion to probate a will produced, to receive evidence of a subsequent but lost will which revoked the one propounded. In that decision the conclusion was reached that such evidence was admissible, although the court had no power to probate the lost will. It was received to overthrow the proposition that the will propounded was the last will of the testator.[1] There are a number of decisions to the same effect, so far as the admission of such evidence is concerned; and the proposition that such evidence is admissible is well settled, for the purpose of showing that the will propounded is revoked, expressly or impliedly, and not entitled to probate.[2] In such an instance the revocation of the former will does not "depend upon the question whether its [the last will] loss or destruction was the result of fraud or of accident."[3] Where a will in writing of lands could be revoked by the parol republication of a former will in writing, it was held that, in order to ascertain whether or not the republished will operated as a revocation, its contents may be proved by parol if the will itself cannot be found, the proper ground for such secondary evidence being first laid.[4]

[1] Sec. 9.

[2] Helyar v. Helyar, 1 Lee, 472 (1754); Legare v. Ashe, 1 Bay (S. C.), 464 (1795); Goods of Brown, 1 Sw. & Tr. 32 (1858); S. C. 4 Jur. (N. S.) 244; 27 L. J. (P. D.) 41; Havard v. Davis, 2 Binney, 406 (1810); Jones v. Murphy, 8 W. & S. 275 (1844); Wallis v. Wallis, 114 Mass. 510 (1874); Harwood v. Goodright, Cowp. 2, p. 87 (1774); Hope's Will, 48 Mich. 518 (1882).

[3] Wallis v. Wallis, *supra*.

[4] Havard v. Davis, 2 Binney, 406 (1810).

CHAPTER III.

PLEADING — POINTS OF PRACTICE.

Sec. 31. **Production — Petition.**— The proper allegation of the loss, destruction or suppression of the will dispenses with its production or an exact copy; for the law does not require something to be done which it is impossible to do.[1] But the petition should set out the substance of the will, averring the facts to show a due execution, and showing the interest therein of the petitioner. Such is the universal practice, and yet few, if any, decisions are published which touch this point.[2] In other instances a supposed copy is set out *in extenso*.[3] In still other instances the alleged copy is made an exhibit.[4] In these latter cases the substance was also set out in the petition; and in Connecticut it was alleged that the copy attached was such as the witnesses who knew its contents declared it to be.[5] In an Alabama case there was set out in the pleading a purported copy, and an affidavit of search for the original, and that the will was in substance as set out, was attached.[6] Where the proceeding is in equity to set up or establish the

[1] Matter of Delaplaine, 45 Hun, 225 (1887).

[2] Morris v. Swaney, 7 Heisk. 591 (1872); Harris v. Tisereau, 52 Geo. 153 (1874); S. C. 21 Am. Rep. 242; Mercer v. Mackin, 14 Bush, 434 (1879); S. C. 1 Am. Rep. 399; Davis v. Sigourney, 8 Met. 487 (1844); Hall v. Gilbert, 31 Wis. 691 (1873); Timon v. Claffy, 45 Barb. 438 (1865).

[3] Conoly v. Gayle, 61 Ala. 116 (1878); Hildreth v. Schillinger, 2 Stock. Ch. 196 (1854); Dudley v. Warner, 41 Vt. 59 (1868).

[4] Wyckoff v. Wyckoff, 1 C. E. Gr. (N. J.) 401 (1863); Newell v. Homer, 120 Mass. 277 (1876).

[5] Johnson's Will, 40 Conn. 587 (1874).

[6] Apperson v. Cottrell, 3 Port. (Ala.) 51 (1876); S. C. 29 Am. Dec. 239. This affidavit was taken to be sufficient evidence of search having been made when the case was called for trial, no objection being made to this kind of proof.

will, and it is sought to hold the defendant as trustee of the devised property he has received, the bill should pray for an accounting as well as for the establishment of the will.[1] The petition may be amended to conform to the proof.[2]

Sec. 32. **Allegation of loss or destruction — Pleading.** The allegation of loss, destruction or suppression should be an unequivocal one and leave no room for doubt. Thus, it was alleged in an affidavit of loss "that no testamentary paper of the deceased had, at any time, come to his [the propounder's] *hands* or possession, or now is under his power or control." This was held insufficient, for the reason that it did not state that no such a paper had come "to his knowledge."[3] This ruling is very well illustrated by what is said in the section next following this one; for it will be observed that the affidavit above referred to did not show, beyond a doubt, the actual loss, destruction or suppression of the will sought to be probated. It must also appear by the allegations of the petition that the will was unrevoked and uncanceled at the testator's death.[4]

Sec. 33. **Will in existence.**— From what has been said it will readily be seen that the petition must show either an actual loss, destruction or suppression of the will. The word "suppression," in this and the preceding section, is used in a limited sense,— nearly in the sense of destruction,— in the sense that the will has been carried beyond the jurisdiction of the court and cannot be obtained by the propounder, or is known to be in existence but the place of concealment and the concealer is unknown, or the court cannot lay its hand upon him to compel its production; for if the will is in existence and the propounder of it as a lost will can produce it, or the court can, by its pro-

[1] Hall v. Gilbert, 31 Wis. 691 (1873); Harris v. Tisereau, 52 Geo. 153 (1874); S. C. 21 Am. Rep. 242.

[2] Sugden v. Lord St. Leonards, 1 P. D. 154 (1876); S. C. 34 L. J. (N. S.) 372; 24 W. R. 479; 45 L. J. (P. & D.) 49; 17 Moak, 453.

[3] Colvin v. Frazer, 1 Hagg. 107 (1827).

[4] Newell v. Homer, 120 Mass. 277 (1876).

cess, reach the person who has possession of it, the will cannot be probated as a lost will. Statutes in nearly all states invest probate courts with plenary power to compel the production of a suppressed will; and until that power is exhausted it cannot be probated as a lost will.[3] If it is developed in evidence on the trial that "the will is probably in existence, and, for aught that appears, may be procured and produced," the petitioner will fail.[4] Yet if it is shown that the petitioner supposed it was lost when he brought the action, and it develops on the trial that the defendant has it in his possession, its production may be then enforced and it be then and there probated upon the application made.[5] In a complaint to establish and probate a lost will, after describing it particularly, its provisions, and that it was in existence at the testator's death, it was charged that the two defendants (heirs) "got access to the papers of the testator, and there found and discovered said will, and got the same into their possession, and concealed, and suppressed *or* destroyed the same." A statute of the state gave power to the probate court to bring before it any person who concealed a will or had it in his custody, and allow its probate. The petition was held insufficient, the court saying: "It does not show that the alleged will, which it seeks to have established, was either lost or destroyed. It should allege one or the other, in order to be sufficient. . . . In a proceeding requiring so much certainty of allegation and clearness of proof as is required in this proceeding, this allegation must be held insufficient. It is not certain, under the allegation, that the will is not in existence and cannot be got before the court and proved in the other mode of proceeding contemplated by the statute [for the probate of wills in existence]."[6] Even without a statute, it may well be doubted if a probate court has not

[1] McBeth v. McBeth, 11 Ala. 596 (1847).

[2] Dudley v. Warner, 41 Vt. 59 (1868).

[3] McBeth v. McBeth, *supra*.

[4] Kaster v. Kaster, 52 Ind. 531 (1876).

ample power to compel the production of a will in its jurisdiction.

Sec. 34. **Proof must conform to petition — Fraudulent destruction.**— The proof must conform to the allegations of the petition. If it be alleged that the will was lost or destroyed after the death of the testator, it must be alleged and proved to have been in existence at his death; if alleged to have been lost or destroyed before his death, it must be alleged and proved to have been fraudulently destroyed (within the meaning previously given to the word fraudulent) during the life-time of the testator.[1] A very instructive case upon this point, and what is a fraudulent destruction, was recently decided in California. A statute of that state provided that "no will shall be proved as a lost or destroyed will unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the life-time of the testator." The petition charged that the will sought to be established "was fraudulently burned and destroyed by and through the neglect and intention of one Laura Stevens, who was then and there the nurse and sole attendant upon said decedent; and that said Mary Kidder (the decedent) died without any information or knowledge of the facts of said burning and destruction thereof." This was held to be an insufficient charge of a fraudulent destruction, because no fact and circumstance constituting the fraud was stated. The court found "that when said last will and testament was brought to her (the testatrix) she partially withdrew it from the envelope and then returned it there, and then allowed it to fall from her hand into the fire, when it was wholly consumed. That said destruction of said will was wholly unintentional on the part of said Mary Kidder; . . . and that the wife of said Ira Stevens (the nurse) was present at the time said will was burned and saw it fall into the fire, but did not make any effort to preserve it, and did not inform said Mary Kidder that it had fallen into the fire

[1] Kidder's Estate, 57 Cal. 282 (1881).

or was burned or destroyed." This finding, it was held, did not show any fraud on the part of the nurse nor a fraudulent destruction.[1]

SEC. 35. **Parties.**—No one can insist on the probate of a will unless he is in some way interested in it. Usually that interest is that of a devisee or legatee. Perhaps a purchaser, from the devisee, of the land devised could insist upon its probate as a muniment of his title. In some states the probate of a lost will may be upon an *ex parte* application. Such was the fact in the celebrated Gaines case, already cited, the right to contest the validity of the will and its probate being left open. In an Irish case it was said: "As a general rule the court requires the draft or copy of a lost or destroyed will to be propounded before admitting it to probate; but where satisfactory evidence was given of the contents of a will, of the due execution, of its existence at the time of the testator's death, and of its subsequent destruction, the persons interested under it, and the persons in whose custody it was, not being in any way to blame for such destruction, the court, with the consent of the only persons interested in the event of an intestacy, granted probate of a draft on motion;" and it was added, "but the court will not, on motion, grant probate of the contents of a lost or destroyed will without either the consent of or notice to the next of kin."[2] And it is the general rule, except where probate is allowed on an *ex parte* application, that all of the next of kin of the testator, or all those, in other words, who would have inherited the property devised in case of his intestacy, must be made parties defendant in the application to probate the lost will.[3] No one should be made a plaintiff unless he is a devisee under the will, and if he will not join in the application, of course he may be made a defendant. If brought in on the wrong

[1] Estate of Kidder, 67 Cal. 487 (1885); S. C. 6 Pac. Rep. 326.

[2] Goods of Callan, 9 Ir. Eq. 484 (1874).

[3] Goods of Denston, 3 Curteis (Eng.), 741 (1843); Apperson v. Cottrell, 3 Port. 51 (1836); S. C. 29 Am. Dec. 239.

side of the case no one but he can object, not even in the instance of an infant.[1] If no objection is made at the non-joinder of proper parties, the error is waived, and cannot be, for the first time, raised in the appellate court.[2] If a will has already been probated, and the proposed will in any way affects such probated will and the interests of the devisees or legatees under it, such devisees and legatees should also be made parties to the application to probate.[3] If the proceeding is to establish the will in a court of equity, and to hold the receiptor of the devised property or its proceeds a trustee for the devisee or legatee, then only the persons to be charged with a receipt of the property or its proceeds need be made parties, all the devisees or legatees joining in the action. While no authority can be cited for this statement, yet it is a reasonable and safe rule to so hold. Perhaps, however, there should be added as a party the executor or administrator, either as plaintiff or defendant. In one case those who had purchased the devised real property of the heirs were made parties defendant, but nothing was said of this fact in the opinion;[4] and in still another case purchasers of the administrator with an early will annexed were held proper parties in a bill in equity to establish and compel an accounting.[5] If persons who have no interest in the estate or will are made parties, the case, as to them, will be dismissed.[6]

Sec. 36. **Temporary letters of administration — Advertisement.**— If the will cannot be found at the death of the testator, but it is known that one is in existence, a temporary administration will be granted.[7] The practice in the

[1] Idley v. Bowen, 11 Wend. 227 (1833).

[2] Hall v. Gilbert, 31 Wis. 691 (1873); Dower v. Church, 23 W. Va. 23 (1882).

[3] Dower v. Church, 28 W. Va. 23 (1882); S. C. 57 Am. Rep. 646. That all heirs should be made parties, see Vallance v. Vallance, 1 Hagg. 603 (1828).

[4] Kaster v. Kaster, 52 Ind. 531 (1876).

[5] Gaines v. Chew, 2 How. 619 (1845).

[6] Everitt v. Everitt, 41 Barb. 385, 395 (1864).

[7] Vallance v. Vallance, 1 Hagg. 693 (1828); Goods of Cousin, 1 N. of Cas. 296 (1841); Goods of Campbell, 2 Hagg. 555.

Irish court of chancery, where a will is lost (not destroyed), has been outlined in the following quotation: "Before applying for probate of a will which is stated to have been lost, an advertisement should be published offering a reward for the recovery of the will." Immediately following this statement is the following order: "Let this case stand over until an advertisement is published in the Cork 'Constitution,' offering a reward of £10 for production of the will."[1] Where the codicil to the will was within itself complete after advertisement made, the court decreed a probate of the codicil.[2] This advertisement should describe the will as accurately as possible, giving the substance of its contents and the names of the subscribing witnesses, and such other *data* as can be obtained.[3] This, however, is only one method of search for the lost instrument, of which more hereafter will be said.

Sec. 37. **Actual production of will in existence not necessary to probate.**— It may be proper to here state that the production of the original will, even when it is in existence, is not always necessary. Thus, a draft which was the instrument drawn up by the solicitor for his guidance, and from which he drew the actual copy, was admitted to probate, the next of kin consenting.[4] And where the original was not produced, a good reason for its non-production being shown, a copy made subsequent to its execution was admitted over objections raised.[5] So where a testator, not an inhabitant of the state, dies out of it leaving assets, the surrogate or probate court of the county where the assets are has jurisdiction to take proof of the will and may act although the original will is in the possession of a court or tribunal of another state or country and cannot be produced.[6] In such a case proof of the substance is enough.[7]

[1] Goods of Callaghan, 13 Ir. Ch. 245 (1880).

[2] Goods of Halliwell, 4 N. of Cas. 400 (1846); Medlycott v. Asheton, 2 Add. 239 (1824); Tagart v. Hooper, 1 Curt. 289 (1837).

[3] Coote's Probate Proceedings, 589.

[4] Goods of Barber, L. R. 1 P. & D. 267 (1866).

[5] Matter of Delaplaine, 45 Hun, 225 (1887).

[6] Russell v. Hartt, 87 N. Y. 19 (1881).

[7] Younger v. Duffie, 94 N. Y. 535 (1884).

Sec. 38. **Joinder of actions.**— If the suit is in equity to establish the will, an accounting may be called for and had in the same action.[1] In an action to set up a will, a prayer for the cancellation of a deed depending upon the nontestacy of the testator was prayed, and it was so decreed.[2]

Sec. 39. **Enjoining a distribution.** — In Kentucky, where it was held that a court of equity would not set up a lost will, yet an injunction against the distribution of the assets of the estate was granted until the alleged devisees had an opportunity of proving the will in a court of probate.[3] But it was held in another case that a court of equity would not enjoin the administration of an estate in order to give the propounder of a will an opportunity to test the memory or the perjury of an attesting and necessary witness to the contents.[4]

Sec. 40. **Plea — Answer.**— An answer or plea of insanity or revocation is admissible.[5] A plea objecting to the probate of a lost will, for the reason that "the instrument sought to be established purports to be only a copy of the will," is insufficient; so is one stating that "said instrument or writing ought not to be admitted to probate, because the same is not entitled to probate as the last will and testament," being merely the statement of a conclusion, opinion or inference without the allegation of any fact on which it is based.[6]

Sec. 41. **Interest vesting.**— Immediately on the death of the testator the interest of the devisee or legatee attaches, and it is not divested by the fact that the will is destroyed.[7] Nor does the will cease to be his will from the fact that it is lost or destroyed without his agency.[8]

[1] Gaines v. Relf, 2 How. 619 (1845).

[2] Voorhees v. Voorhees, 39 N. Y. 463 (1868).

[3] Campbell v. West, 3 B. Mon. 242 (1842).

[4] Mosely v. Carr, 70 Geo. 333 (1883).

[5] Apperson v. Cottrell, 3 Port. (Ala.) 51 (1836); S. C. 29 Am. Dec. 239.

[6] Dudley v. Wardner, 41 Vt. 59 (1868).

[7] Payne's Will, 4 T. B. Mon. 422 (1827).

[8] Foster's Will, 13 Phila. 567 (1877); S. C. 34 Leg. Int. 222.

CHAPTER IV.

PROOF OF EXECUTION AND FACTUM OF WILL.

SEC. 42. **Proof of execution of will necessary.**— After the issues are formed proof of the execution of the alleged will is necessary, and the court may insist upon it as the first thing to be proved; and if there is a failure on this point—if the execution is not admitted—the court may nonsuit the plaintiff or find against him in accordance with the general practice prevailing in the particular jurisdiction. This is, however, a matter of discretion with the court, being merely a rule as to the order in which the evidence at the trial shall be introduced. A number of authorities have laid down the rule that the trial court has a right to insist that the *factum* of the alleged will shall be first proved before any other steps are taken.[1] The proof of execution must be established the same as if the will was produced in court.[2]

SEC. 43. **Execution proved by subscribing witnesses.**— The most natural resort to prove the execution of a lost or destroyed will is to the testimony of the subscribing or attesting witnesses; in fact, one or both must be produced, or their non-production satisfactorily accounted for.[3] In some states the production of one attesting witness is sufficient to

[1] Conoly v. Gayle, 61 Ala. 116 (1878); Mahood v. Mahood, 8 Ir. Eq. 359 (1874); Padmore v. Whatton, 3 Sw. & Tr. 449 (1864); S. C. 33 L. J. (P. & M.) 143, 422; Voorhees v. Voorhees, 39 N. Y. 463 (1868); Morris v. Swaney, 7 Heisk. 591, 599 (1872); Dawson v. Smith, 3 Houst. (Del.) 335 (1866); Jaques v. Horton, 76 Ala. 238, 245 (1884).

[2] Collyer v. Collyer, 4 Dem. 53 (1886); S. C. 17 Abb. N. C. 328; Page v. Maxwell, 118 Ill. 579 (1886); S. C. 8 N. E. Rep. 852; Butler v. Butler, 5 Harr. (Del.) 178 (1847); Everitt v. Everitt, 41 Barb. 385 (1864).

[3] Collyer v. Collyer, *supra.*

entitle the propounder to have the will probated; in others, two or all of them.[1] In the case of a lost will, whether or not the propounder must call more than one of the attesting witnesses will depend upon the practice applicable to wills produced for probate — the rule in the one not being dissimilar from that in the other. A general statute designating what is necessary to prove a will generally, applies to a lost will and the number of witnesses to be called.[2] A. drew out for the deceased three wills, each of which contained a revocatory clause. A. got no benefit by the last will, but did by the other two. By A.'s evidence alone it appeared that the testator took the three wills and selected the one earliest of date as the one he desired to operate, and then burned the other two. The will of latest date was not signed, so A. said, and was therefore not executed. It was held that he died intestate; that where a testamentary paper is not in existence, and all the persons present at an intended execution of it agree that it was not thereby executed, the court cannot, on a mere suspicion to the contrary, say it was and decree its probate.[3]

"In proceeding to consider and apply the evidence to the allegations of the complaint it is to be observed that the formalities or acts — several in number — which the law requires to constitute a valid will are to be proved in the usual way, as other facts are required to be proved to make them evidence in a court of justice. While the statute prescribes rules to be observed in the execution and publication of wills which it does not prescribe in regard to the execution and delivery of other written instruments, the proof of the several acts so prescribed is the same as the proof required to establish any other fact. Thus, if the

[1] Thornton v. Thornton, 39 Vt. 122 (1867); S. C. 6 Am. L. Reg. 341. See Apperson v. Cottrell, 3 Port. 51 (1836); S. C. 29 Am. Dec. 239.

[2] Page v. Maxwell, 118 Ill. 579 (1886); S. C. 8 N. E. Rep. 852. In this case one attesting witness was held sufficient to prove the execution; and so in the next case cited. Jackson v. Vickory, 1 Wend. 406 (1828); S. C. 19 Am. Dec. 522.

[3] Eckersley v. Platt, 36 L. J. (P. D.) 7 (1867); S. C. 15 L. T. 327.

instrument to be proved is in existence and within reach of the process of the court, it must be produced in court. If lost or destroyed, or its production from any cause becomes impossible, and that appears to the satisfaction of the court, secondary evidence may be resorted to. If there are witnesses to the execution of the instrument who have subscribed their names as such (and without subscribing witnesses selected by the testator himself a will has no force), they must also be produced and examined, if living and within the power of the court. If they be dead or beyond the jurisdiction of the court, secondary evidence may also be resorted to in this contingency and proof taken of their handwriting. So if the witnesses, when produced and examined, have lost all recollection of the transaction, and especially of the extrinsic facts, other evidence may be again summoned to supply the imperfection of the witnesses' memory. For example, when the witnesses cannot recall to memory the circumstance that they subscribed at the request of the testator, that fact stated in the attestation clause will be some evidence to show that such a request was made. And if the witnesses are men of good character, and there is no doubt as to their signatures, or any other suspicious circumstances, the attestation clause would be deemed sufficient evidence of a request. In short, the law lays down no stubborn, inflexible rules in such cases, but accepts the best evidence that can be procured adapted to the nature of human affairs, human infirmities and casualties, which tends with reasonable certainty to establish the facts in controversy. The proof of a lost or destroyed will proceeds upon the theory that it is not in existence and cannot be produced before the surrogate, and therefore the case is one of secondary evidence exclusively."[1]

"It is undoubtedly material to show, in the proof of the regular execution of a will, that the testator signed the

[1] Everitt v. Everitt, 41 Barb. 385 Barb. 448 (1866); Rider v. Legg, 51 (1864); Lawrence v. Norton, 45 Barb. 260 (1868).

same in the presence of all the three subscribing witnesses; and this we are of opinion was in fact proved, if the jury believed the witness Alida Truax. She swore expressly that she saw the testator sign the will; that the three witnesses were present, and that she and her husband witnessed it,—she being called in for that express purpose. It is true she stated that she did not then remember that Van Valkenburgh witnessed the will, and on her cross-examination said that she did not then recollect that any person was in the room when she witnessed the will besides the testator and his wife and herself and her husband. But it must be recollected that she was speaking of a transaction some thirty-six years old, and if she could not call to her remembrance all the facts minutely, so as to be able to state them distinctly and positively, her evidence is not therefore to be altogether disregarded. I understand from her testimony that she intended to swear to her belief that Van Valkenburgh signed the will, though she could not recollect the particular fact. Her evidence should have gone to the jury, and if she was an intelligent, respectable witness, they should have found in favor of the execution of the will. But independently of this testimony, I am of opinion the evidence offered and rejected was sufficient to have authorized the proof of the contents of the will. It was more than thirty years old, and it was offered to be shown the premises had been held under it from the death of the testator. Now, if the will had been produced, and the execution of it had appeared regular on its face, under the proof offered, it ought to have been received in evidence without requiring proof of its execution." "Upon the ground, then, that the secondary evidence of its contents was admissible, was the execution of it sufficiently established? It was, as before said, some thirty-six years old, and would have proved itself if produced and the execution of it appeared regular on its face. The best evidence of which the nature of the case admits is competent for this purpose. The only objection to the most strict proof

of the execution of the will that can be exacted under any circumstances is that it was attested by only two witnesses; but making reasonable allowance for the great lapse of time and the difficulty of proof, the testimony of Mrs. Truax, together with that offered to be given by Platt, a son-in-law of the testator, and that which was given by Crouns on his cross-examination, it seems to me there cannot be a doubt that it was duly attested by three witnesses. Whether it was or not must at this late day depend upon circumstances, and upon those the jury may find the fact of execution."[1] The testimony of the son-in-law was that at the death of the testator there was a meeting of his heirs, at which the will was read as a valid will. The testimony of Crouns was that his father was executor under the will.

Sec. 44. **Attesting witnesses dead or unknown.**— It very often happens that the attesting witnesses are dead, but this will not prohibit the setting up of the will, "if clear proof be made that such a will did in fact exist."[2] In such an instance resort is had to secondary evidence, which, however, must be sufficient to establish with reasonable certainty all the facts which are necessary to concur in the execution of a valid will;[3] such as the signing.[4] Thus the handwriting of the witnesses may be proved by one who saw and recognized it.[5] Even though the names of the attesting witnesses be unknown, if the fact that it was duly attested by the requisite number of persons can be proved, the will may be established and probated.[6]

[1] Fetherly v. Waggoner, 11 Wend. 599 (1834).

[2] Harris v. Tisereau, 52 Geo. 153 (1874); S. C. 21 Am. Rep. 242. In this case this rule is said to be in force in both England and this country.

[3] Tynan v. Paschal, 27 Tex. 286 (1863); S. C. 84 Am. Dec. 619.

[4] Chisholm v. Ben, 7 B. Mon. 408 (1847).

[5] Tynan v. Paschal, *supra;* Collyer v. Collyer, 4 Dem. 53 (1886); S. C. 17 Abb. N. C. 328.

[6] Jackson v. Betts, 6 Cow. 377 (1826), citing Dan v. Brown, 4 Cow. 483 (1825); S. C. 15 Am. Dec. 395. The same is true in case of a lost deed. Jackson v. Vail, 7 Wend. 125 (1831).

Sec. 45. **Presumptions as to execution — Attestation clause — Drawn by an attorney.**— There are certain presumptions indulged in with reference to the due execution of a will, chiefly arising from the recitals in the attestation clause, or its being in regular form, or from the fact that one skilled in the law either wrote the will or superintended its execution. If one skilled in the law, as an attorney or solicitor, superintended the execution of the will, there is a stronger presumption raised that the will was properly executed than if its execution was superintended by one not so skilled. This is a mere presumption of fact and not of law.[1] In this last case it was said: "Where the witnesses are dead, or from lapse of time do not remember the circumstances attending the attestation, the law, after the diligent production of all the evidence then existing, if there are no circumstances of suspicion, presumes the instrument properly executed; particularly where the attestation clause is full." In another case it was said: "Here the attorney drew the will, subscribed it as a witness, and testifies to everything but the name of the third witness. It seems to me that, from this, the presumption of due execution is inevitable."[2]

In 1835, in England, a will was executed and left with the solicitor, who drew it, for safe keeping. In 1871 it was sought in the depositories of the solicitor, but not found. He was then dead. But a copy was found in such place of deposit, and an entry in his day-book, in his handwriting, to the effect that he had prepared a will for the alleged testator, attested its execution, and been paid for his services in drawing it. This memorandum and the copy were put in evidence, and the will admitted to probate.[3] In speaking of a full attestation clause and its effect, the court

[1] Butler v. Benson, 1 Barb. 526, 536 (1847).

[2] Dan v. Brown, 4 Cow. 483, 490 (1825); 15 Am. Dec. 395. The attorney in this case was Hon. William L. Marcy, of New York. Citing Hands v. James, Com. Rep. 531.

[3] Goods of Thomas, 20 W. R. 149 (1871).

remarked in a New York case that "if the witness had been able to state that the two or three names which he noted at the foot of the paper were subscribed to a full attestation clause, showing that the paper had been executed with the formalities required by the statute of wills, that testimony, in connection with the other testimony adduced by the proponent, might have made out a *prima facie* case. But the record as it stands contains no evidence whatever that the paper which Rabb testifies he saw was duly executed as a will. This we regard as a fatal defect in the proponent's case. In all the cases cited by the appellant's counsel upon this branch of the case, there was a full attestation clause. They authorize the proposition that 'if the attestation clause is full and the signatures genuine, and the circumstances corroborative of due execution, and there is evidence disproving a compliance in any particular, the presumption may be lawfully indulged that all the provisions of the statute were complied with, although the witnesses are unable to recollect the execution or what took place at the time.' That proposition is not questioned. The foundation upon which the proposition rests is the attestation clause, and that is lacking in this case."[1] But the mere fact that one skilled in the law drew the will, and that there was a full attestation clause, are not of themselves (both taken together) sufficient to prove its execution.[2] Its execution cannot be inferred from proof of facts which, if the will was before the court, would in no way tend to establish it, and which are usually reasonably consistent with the contrary conclusion.[3]

Sec. 46. **Declarations of testator.**—Whether or not the declarations of the testator are admissible to prove the *factum* or execution of a will, the authorities are not agreed. In New York it was said: "While there is considerable

[1] Russell's Will, 33 Hun, 271 (1884).

[2] Hatch v. Sigman, 1 Dem. 519 (1883).

[3] Tynan v. Paschal, 27 Tex. 286 (1863); S. C. 84 Am. Dec. 619.

conflict in the few cases involving declarations of deceased persons in proceedings of this character, yet I regard that as the better rule — the more consistent and reasonable — which favors their admission; but while these declarations are admissible, it is only as a circumstance to be taken in connection with other proof tending to establish a certain fact. It would be rendering the strict language of the statute nugatory to say that declarations of decedent, however lucid and precise they may be, however minutely they may detail the facts occurring at the execution of the will, and however numerous they may be, will establish the execution of the will, and also be tantamount to the two credible persons made an indispensable necessity by the statute." In Kentucky it was said: "The right to make a will, whether conferred by statute or existing by common law, is regulated by statute as to the mode of its exercise, and, unless exercised according to the mode prescribed, cannot be exercised at all; and to allow the mere declarations of the testator, to prove compliance with the statutory conditions, would be to substitute such declarations for that which the statute requires shall be in writing."[1] But the court was careful to say that such declarations with other evidence is admissible. Such "other evidence" is necessarily evidence of the execution and *factum* of the will. But the mere declaratiou that there was a will which was duly executed cannot be established alone by the testator's declaration. Other evidence of its execution is necessary,[2] even where a copy is produced.[3] Standing alone such declaratious are insufficient; yet they are always admissible if to be followed by other evidence, whether direct or circumstantial.[4] In another New York case it was recently

[1] Mercer v. Mackin, 14 Bush, 434 (1879); S. C. 1 Amer. Prob. Cas. 399.

[2] Clark v. Morton, 5 Rawle, 234 (1835); Tynan v. Paschal, 27 Tex. 286 (1863); S. C. 84 Am. Dec. 619.

[3] Goods of Ripley, 1 Sw. & Tr. 68 (1858); S. C. 4 Jur. (N. S.) 342.

[4] Colvin v. Fraser, 2 Hagg. 266 (1829). "To hold otherwise would be to dispense with all the safeguards required by the statute." Russell's Will, 33 Hun, 271 (1884). See Page v. Maxwell, *supra*.

said: "The proof of lost wills rests in secondary evidence; and we are inclined to think that so far as the existence of a will shown to have been duly executed may depend upon that intent of the testator without the aid of any act, his declarations may be competent as some evidence of his intent as of the time they are made, but that such evidence should be carefully scrutinized and cautiously weighed."[1]

Sec. 47. **Admissions.**— The admissions of one claiming under a will may be used as proof of its execution. Where a grandson brought an action of ejectment after the death of his father and mother, deriving title from his grandfather, the admissions of the father and mother that the grandfather executed a will, which was lost, by which they claimed title, were held admissible.[2] Perhaps such admissions would be sufficient to prove its execution. So in another case the declarations of a deceased person, who had been in the possession of property, claiming a limited interest therein under a particular will, were held admissible to prove the fact that such will had a legal existence, and also that certain persons were named executors therein. And where a copy of such will, the original not being forthcoming, was found in the possession or amongst the papers of the legal adviser of one of such executors, it was held evidence of such will, and was admitted as such.[3]

Sec. 48. **Burden — Sufficiency of proof.**— The burden of proving the execution and existence of the will is upon the propounder to prove "by strong, positive and convincing evidence," it is said.[4] But the same latitude is allowed as if the will was produced in court.[5] The facts tending to establish the fact of publication may be shown, such as the

[1] Matter of Marsh, 45 Hun, 107 (1887); Sugden v. Lord St. Leonards, L. R. 1 P. D. 154 (1876); S. C. 45 L. J. (P. & M.) 1; 34 L. T. (N. S.) 372; 24 W. R. 479; 17 Moak's Rep. 453.

[2] Fetherly v. Waggoner, 11 Wend. 599 (1834).

[3] Sly v. Sly, L. R. 2 P. D. 91 (1877); S. C. 46 L. J. P. D. 63; 25 W. R. 463.

[4] Southworth v. Adams, 11 Biss. 256 (1882).

[5] Everitt v. Everitt, 41 Barb. 385 (1864).

draftsman's direction and instructions to the testator, acquiesced in by him.[1] A. and B. testified that the alleged will had been in existence; C. and D., the alleged attesting witnesses, said they had signed some paper, but did not know what it was. This was held insufficient to prove the execution of the will; because no evidence identified the paper referred to by A. and B. with the one referred to by C. and D.[2] The attorney who drew and who produced the draft, containing neither the decedent's name nor that of the witnesses, was unable to say positively that he was one of the attesting witnesses, and knew not the name of the other. It was held that the execution of the will was not proved.[3] The testator's declaration that he had "made a will" is not proof of its execution, it was said, "but an expression of his opinion as to what was necessary to constitute a valid will, in which he may have been wholly mistaken. But had he declared that he wrote and signed it with his own hand, evidence of such declarations would not be sufficient to authorize the probating of the will."[4] Proof of the sanity of the testator is not indispensable in the absence of proof that he was not of sound mind. The disposition made by him of his property may of itself afford sufficient evidence of his sanity.[5]

Sec. 49. **Spoliated.**— If the will is shown to have been intentionally destroyed by one interested in its destruction, especially if he is a party to the proceedings, or has an opportunity to defend, its proper execution may be inferred, or at least many things will be presumed to have been done of which there is little or no evidence.[6]

[1] Voorhees v. Voorhees, 39 N. Y. 463 (1868).

[2] Crickett v. Field, 19 W. R. 232 (1871).

[3] Collyer v. Collyer, 4 Dem. 53 (1886); S. C. 17 Abb. N. C. 328.

[4] Mercer v. Mackin, 14 Bush, 434 (1879); S. C. 1 Amer. Prob. Cas. 399.

[5] Anderson v. Irwin, 101 Ill. 411 (1882).

[6] Tynan v. Paschal, 27 Tex. 286 (1863); S. C. 84 Am. Dec. 619.

CHAPTER V.

PROOF OF LOSS, DESTRUCTION OR SEARCH.

SEC. 50. **Proof of loss or destruction essential.**— Since the will itself is the best evidence of its contents, it must be produced, or evidence given showing an excuse for its non-production. It can scarcely be said that this evidence should be produced before evidence of the execution of the will is given; for, until a valid will is shown to have been once in existence, it cannot logically be said that search for it must first be made and proved before proof of its existence is given. This is somewhat technical and an immaterial point of practice; for the court, for the time being, may assume that there was a will, as alleged, and allow evidence of a proper search to be given. The matter is discretionary with the court; and, whichever way it is taken, proof of loss or destruction of the will must be given before evidence of its contents is admissible.[1] Proof of loss or destruction, when shown to have been in existence at the death of the testator, "is a material fact to be proved, particularly when it was last seen in the possession of the person in whose favor it is claimed to have been made."[2] If it is charged that a defendant, who is resisting the probate, destroyed the will, his declarations are admissible to show its destruction.[3] Such a person's threats, or the threats of a person interested, are admissible to show a destruction, and it is said without a charge that he destroyed it, on the ground that it was lost or destroyed, and not revoked.[4] It

[1] Morris v. Swaney, 1 Heisk. 591 (1872); Mahood v. Mahood, 8 Ir. Eq. 359 (1874); Dawson v. Smith, 3 Houst. (Del.) 335 (1866); Vining v. Hall, 40 Miss. 83 (1866); Minor v. Guthrie, 9 Ky. L. Rep. 113.

[2] McNally v. Brown, 5 Redf. 372 (1882).

[3] Youndt v. Youndt, 3 Grant, 140 (1861).

[4] Scoggins v. Turner, 98 N. C. 135 (1887); S. C. 3 S. E. Rep. 719.

will not be presumed, however, that any one destroyed it from the bare fact of possession in him being shown. If it is to his interest to destroy it, that fact must be shown.[1] Where a will was destroyed after probate, it was said: "The fact that the will of Benjamin Whitfield was found in a book kept by the clerk of the court of pleas and quarter sessions, in accordance with the requirements of law, is *prima facie* evidence of the probate of the will. *Omnia præsumuntur rite acta esse.*"[2] What became of the will is immaterial, so that it was not destroyed or canceled by the testator, or in his presence and by his consent and direction, from which the *animo revocandi* is conclusively presumed.[3] It is not necessary for the party propounding the will to show how it was destroyed.[4]

SEC. 51. **Proof of loss, to whom directed.**— It is said that the proof of loss or destruction is directed to the court, and need not be as strict and technical as when submitted to a jury.[5] If the evidence does not show its loss or fraudulent destruction, the court may arrest the case and direct the verdict. "It is true, as was contended by counsel for the defendant, that it is a fact for the jury ultimately to pass upon, and find whether the will is, or is not, shown to have been fraudulently destroyed; or rather this becomes ultimately a question for the jury in all cases where the party adduces sufficient evidence in the case to entitle him to go to the jury upon the question. If, on the contrary, the evidence so far fails to make out this fact that the court would feel itself constrained to set aside the verdict of the jury, if they were to find the fact in favor of the party seeking to show the will fraudulently lost or destroyed, then the court, upon the trial, may properly refuse to leave this question to the jury; and even do what was done upon the

[1] Jones v. Murphy, 8 W. & S. 275 (1844).

[2] Nelson v. Whitfield, 82 N. C. 46 (1880).

[3] Scoggins v. Turner, 98 N. C. 135 (1887); S. C. 3 S. E. Rep. 719.

[4] Patten v. Poulton, 1 Sw. & Tr. 55 (1858); S. C. 4 Jur. (N. S.) 341; 27 L. J. (P. & M.) 41.

[5] Fetherly v. Waggoner, 11 Wend. 599 (1834); Eure v. Pitman, 3 Hawks, 364 (1824).

trial of this cause — arrest the trial at this point, by refusing to permit the party to go into evidence to prove the will."[1]

Sec. 52. **Proof of search.**— The burden lies upon the propounder to show that the will cannot be found and that he has made diligent but unsuccessful search for it, in the case of a loss.[2] This must be done before parol or other evidence is admissible to prove its contents.[3] "The general rule is that, to entitle a party to give parol evidence of the contents of a will when there is not conclusive evidence of its destruction, it must be shown that diligent search has been made in those places where it would most probably be found." "I think the defendants [who had the burden of proving the will in the case] are bound to show due search among the papers of the deceased at his usual place of residence; and if, on such search, the will cannot be found, parol evidence is admissible."[4] The places to search are those places where it would most probably be found, if in existence, of which an example was given above in the quotation.[5] Proof of such search is "*prima facie* sufficient."[6] If it is shown that the testator had more than one place of keeping his papers, both places must be searched. "All the party should have been permitted to say on this subject was that he knew not what had become of the will; that the trunk was in his possession at the death of his father, and that the will was not in it at that time. This was all that was necessary or proper, unless the adverse party chose to examine him more particularly as to the fact of the existence of the paper after that time."[7]

Sec. 53. **Examples of search.**— In one case where it was sought to prove the contents of a lost will years after

[1] Knapp v. Knapp, 10 N. Y. 276 (1851).

[2] Morris v. Swaney, 7 Heisk. 591 (1872).

[3] Dawson v. Smith, 3 Houst. (Del.) 335 (1866).

[4] Dan v. Brown, 4 Cow. 483 (1825); Jackson v. Betts, 9 Cow. 208 (1828).

[5] Gaines v. Hennen, 24 How. 553 (1860); Regina v. Johnson, Dears. & B. 340 (1857).

[6] Jackson v. Betts, 6 Cow. 377 (1826).

[7] Betts v. Jackson, 6 Wend. 173 (1830).

the testator's death, and there was no evidence to show whether it had been probated or not, it was said: "It was incumbent on the party to have made examination in the office of the surrogate of the county where the testator died, or in the office of the judge of probate, or to have made inquiry of the executors, if known."[1] Where search was made in the probate office, in different registers' offices in the counties where the lands, of which it was claimed the will contained a devise, lay, among the papers of the owners of the several parcels of land, among the papers of the draftsman, and inquiry was made of the only executor of the three that could be found, and of the several devisees, it was held that sufficient search had been made to let in parol evidence of the will's contents.[2] Where it was sought in a criminal case to prove that the defendant had destroyed the will, proof of search in such places as the testator kept his papers was held not sufficient, but to it must be added proof of search in the proper local probate court.[3]

A plaintiff in ejectment claimed under a lost will. He proved that the testator made a will several years before his death, and deposited it with one Mallory for safe keeping. Afterwards he took it back for the avowed purpose of adding a codicil, which he did about July 7, 1821. On the 1st day of March, 1822, his daughter saw a paper in the drawer of his writing-desk which she had no doubt was his will. Between that day and his going on a journey to visit his son in the following April, she saw him take some papers from the drawer and burn them, but did not know and could not say they resembled the will. She saw him also several times engaged at the desk in arranging his papers, a bundle of which he placed in his trunk. She read the paper hastily and only in part, but was satisfied it was her father's will, and stated several circumstances calculated to identify it with the will and codicil proved to have

[1] Jackson v. Hosbrouck, 12 Johns. 192 (1815).

[2] Brown v. Morrow, 43 Q. B. (Canada) 436 (1878).

[3] Regina v. Johnson, Dears. & B. 340 (1857).

been executed; and she also stated circumstances which had a contradictory tendency. The testator died in May, 1822. The trial judge thought it necessary to show the existence of the will subsequent to the execution of the codicil, and that this was not satisfactorily done by the daughter's testimony. On appeal the appellate court refused to decide whether it was necessary to show the existence of the will at a time after adding the codicil, but held that there was sufficient evidence upon the point to go to the jury, and that it should have been submitted to them as well as that of the revocation. The nonsuit was held error.[1]

"James Mallory testified that Jared Betts, one of the plaintiffs, informed him that the will could not be found; that James Brown had been up to Brunswick and looked for the will in the desk where he supposed it was left, and it could not be found. This is certainly a very explicit admission by one of the plaintiffs. Harvey Betts and Thaddeus Dan stated to the surrogate that they presumed there had been a will, but it could not be found; and that search had been made. The plaintiffs' counsel introduced the petition and affidavit of Brown, Betts and Dan to obtain administration. These, however, are silent as to the question whether due search had been made. The defendants, who claim under the will, were called on to prove that they had made diligent search. Search by other persons, and not at their request, will not suffice. The admission by Jared Betts and Thaddeus Dan to the surrogate was, not that Brown or either of the defendants had made search, but generally that the will could not be found. In what manner and by whom search was made they do not state. It was an admission that did not exonerate the defendants from giving affirmative proof of search made by them or some of them."[2]

Sec. 54. **How proof of search is made — Admissions.**— The usual way of making proof is by the oral testimony of witnesses who have made the search, or by those who were

[1] Betts v. Jackson, 6 Wend. 173 (1826).

[2] Dan v. Brown, 4 Cow. 483, 491, 492 (1825); S. C. 15 Am. Dec. 395.

present when it was made. Such was done in those cases already cited. Where an affidavit of search was filed with the petition, and was read, without objection, to prove loss and search, this was alone held sufficient, and with other evidence was held ample.[1] Admission of one of the adverse parties that the will could not be found was held evidence against him only, and not against the others, where the action was to recover possession of land held by them in common.[2]

Sec. 55. **Declarations of testator to prove destruction.** Those declarations of a testator relating to the destruction by him are not admissible as evidence to show a destruction, but are to show the intention with which the act was done, if there is no other evidence of a destruction; for evidence of an intention not to adhere to the will produced is admissible to contradict the evidence of adherence, whatever be the form of words in which the intention was expressed.[3]

[1] Apperson v. Cottrell, 3 Port. 51 (1836); S. C. 29 Am. Dec. 239.

[2] Dan v. Brown, 4 Cow. 483 (1825); S. C. 15 Am. Dec. 395.

[3] Keen v. Keen, L. R. 3 P. & D. 105 (1873); S. C. 42 L. J. (P. & M.) 61; Staines v. Stewart, 2 Sw. & Tr. 320 (1861); Collyer v. Collyer, 4 Dem. 53 (1886); S. C. 17 Abb. N. C. 328. Evidence of his declarations in regard to the destruction of his will was admitted without objection; but it was thought not to be admissible. Voorhis v. Voorhis, 50 Barb. 119, 125 (1867).

CHAPTER VI.

PRESUMPTION OF REVOCATION.

SEC. 56. **Presumed to be revoked.**— A will that cannot be found at the death of the testator upon proper search made is presumed to have been destroyed by him *animo revocandi*. This is particularly true where it is traced to the testator's possession and never traced out of it.[1] The law presumes that the will was in his possession and so continued until he destroyed it.[2] But whether or not the will is in his possession, the presumption of revocation prevails, with the distinction that stronger evidence to overthrow or rebut it is required in the case of possession than in a case where it is traced out of his possession.[3] This rule prevailed where the testator, being sick, made his will only five days before his death.[4] So this presumption prevails if it cannot be found at the place he left it.[5] The rea-

[1] Helyar v. Helyar, 1 Lee, 472 (1754); Welch v. Phillips, 1 Moo. P. C. 299 (1836); Cutto v. Gilbert, 9 Moo. P. C. 131; Lillie v. Lillie, 3 Hagg. 185 (1829); Scoggins v. Turner, 98 N. C. 135 (1887); S. C. 3 S. E. Rep. 719; Hatch v. Sigman, 1 Dem. 519, 530 (1883); McBeth v. McBeth, 11 Ala. 596 (1847); Jones v. Murphy, 8 W. & S. 275 (1844); Schultz v. Schultz, 35 N. Y. 653 (1866); Wargent v. Hollings, 4 Hagg. 245 (1832); Loxley v. Jackson, 3 Phil. 126 (1819); Mercer v. Mercer, 84 Ky. 21; Minor v. Guthrie, 9 Ky. L. Rep. 113.

[2] Lillie v. Lillie, 3 Hagg. 185 (1829).

[3] Davis v. Sigourney, 8 Met. 487 (1844); Mercer v. Mackin, 14 Bush, 434 (1879); S. C. 1 Amer. Prob. Cas. 399; Knapp v. Knapp, 10 N. Y. 276 (1851); Eckersley v. Platt, L. R. 1 P. & D. 28 (1866); S. C. 36 L. J. P. D. 7; 15 W. R. 232; 15 L. T. 327; Brown v. Brown, 10 Yerg. 84 (1836); Idley v. Bowen, 11 Wend. 227, 236 (1833); Holland v. Ferris, 2 Bradf. 334 (1853); Legare v. Ashe, 1 Bay (S. C.), 464 (1795); Minkler v. Minkler, 14 Vt. 125 (1842); Durant v. Ashmore, 2 Rich. (S. C.) 184 (1845); Southworth v. Adams, 11 Biss. 256 (1882); Appling v. Eades, 1 Gratt. 286 (1844); Matter of Marsh, 45 Hun, 107 (1887); Scoggins v. Turner, 98 N. C. 135 (1887); S. C. 3 S. E. Rep. 719; Fuentes v. Gaines, 24 La. Ann. 85 (1873).

[4] Brown v. Brown, 10 Yerg. 84 (1836).

[5] Bulkey v. Redmond, 2 Bradf. 281 (1853).

sons for the revocation are immaterial in the face of the undisputed fact that a revocation was made.[1]

SEC. 57. **Reasons for presumption.**— In speaking of the reasons for this presumption, and of the presumption itself, Chancellor Walworth said: "Is then the presumption a reasonable one that the testator, who had a perfect right to destroy the will, and who had no interest to keep it if he changed his mind as to the disposition of his property, has done the act? or is it more reasonable to suppose it has been done by some other person in fraud of the right of the devisees, and by perpetrating a crime which the law abhors? I confess I cannot perceive the analogy between this case and that of a lost deed or other paper in which the depositary has an interest in its preservation. After the will had been consummated by the death of the testator, if it was subsequently lost by a party who had an interest in preserving it, the analogy would hold. The law will not presume that a man has acted directly in opposition to his interest; and therefore where he has in his possession a paper which is evidence of his right, and it cannot be found after his death, the law presumes it was lost by accident or spoliated by some one who had an interest to destroy it.

[1] Scoggins v. Turner, 98 N. C. 135 (1887); S. C. 3 S. E. Rep. 719; Holland v. Ferris, 2 Bradf. 354 (1853). In Sugden's Case, quoted at length in section 60, the views expressed in the above section were adopted; but from a remark of the master of the rolls, a statute changed the rule as to the burden of proof, although no reference in the opinions is made to it, nor does it appear to have had any effect in deciding the cases. He said: "By the twentieth section of the Wills Act the *onus* is thrown on those who seek to show that the testator has destroyed his will with the intention of revoking it. The whole of the evidence must be taken together to see whether it raises a presumption that the will was destroyed by the testator with the intention of revoking it." The interpretation to be put upon this remark is that the plaintiff, by her petition, having admitted the destruction of the will, thereby relieved the defendants from showing its revocation; but after having shown evidence sufficient to *prima facie* rebut the presumption she had raised, the burden still rested on the defendants to show a revocation. This is the interpretation the writer puts upon the whole case.

But it is every day's practice to presume the destruction of notes and bonds which have been paid and taken up, and which the obligor, in whose possession they last were seen, had no longer any interest in preserving. A will is of no effect until the death of the testator; until then it is said to be ambulatory, depending on his mere volition, whether it shall remain in existence for a single hour. No person has any rights under it; and the moment the testator wills its destruction he immediately has an interest that it should be destroyed. It not only becomes useless to him, but actually injurious, because, in case of sudden death, it would thwart his then wishes as to the disposition of his property. Very slight circumstances may and frequently do produce material changes in testamentary dispositions; and although I should place very little reliance upon it as evidence to rebut a legal presumption once established, yet the simple fact stated in the preliminary testimony of James Brown, that Mrs. Ayres went from Brunswick to Poundridge to watch by the pillow of her aged dying parent, may have been sufficient to change the whole current of his affections, and had induced him to destroy the will so that she might receive a child's portion of his property. Legal presumptions are founded upon the experience and observation of distinguished jurists as to what is usually found to be the fact resulting from any given circumstances, and the result being thus ascertained, whenever such circumstances occur, they are *prima facie* evidence of the fact presumed; and I have no doubt that five wills, made with all due formality, have been destroyed by the testator, either in secret or when no one was present to be a witness to prove the fact, to where there has been one destroyed or suppressed by fraud, or lost by time or accident, before the death of the testator. If this be so, the legal presumption must be directly the reverse of that which was given to the jury as the law of this case; and if we sanction the decision of the judge at the circuit, we may have the devisees under many wills which have been thus rightfully destroyed

calling upon the heirs at law, through the medium of our courts of justice, to prove that such wills are not in existence; or at least to prove the fact that they were actually destroyed by their ancestors, and have not been fraudulently destroyed or suppressed by themselves."[1]

SEC. 58. **Presumption may be rebutted.**— All the cases, however, hold that the presumption of revocation may be rebutted.[2] It will thus be seen that this presumption is only a *prima facie* one. It may be rebutted, aside from declarations of the testator, by circumstances showing an intention not to revoke the will.[3] Speaking upon this subject, it was said in an English case that "this presumption of fact and this legal consequence may be rebutted by satisfactory evidence; but the burden of proof lies upon the party setting up the will, whether he sets it up by propounding a draft, a duplicate or a canceled will; for whether the paper be found canceled, or whether it be wholly removed and not found at all, still the first presumption as to the person who did the act is the same. The force of the presumption and the weight of the *onus* may be different according to circumstances; but the court, in order to pronounce for a draft, or a duplicate, or a canceled will, must be judicially convinced that the absence or cancellation of the paper once in and not traced out of the deceased's own possession was not attributable to the deceased. This negation may be established by a strong combination of circumstances leading to a moral conviction that the deceased did not do the act; or it may be established by direct positive

[1] Betts v. Jackson, 6 Wend. 173, 180, 181, 182 (1830).

[2] Southworth v. Adams, 11 Biss. 256 (1882); Minkler v. Minkler, 14 Vt. 125 (1842); Durant v. Ashmore, 2 Rich. (S. C.) 184 (1845); Legare v. Ashe, 1 Bay (S. C.), 464 (1795); Jaques v. Horton, 76 Ala. 238 (1884); Davis v. Davis, 2 Addams, 223 (1824); Eckersley v. Platt, L. R. 1 P. & D. 281 (1866); S. C. 36 L. J. (P. D.) 7; 15 W. R. 232; 15 L. T. 327; Knapp v. Knapp, 10 N. Y. 276 (1851); Foster's Appeal, 87 Pa. St. 67 (1878); S. C. 1 Amer. Prob. Cas. 435; 30 Am. Rep. 340; Patten v. Poulton, 1 Sw. & Tr. 55 (1858); S. C. 4 Jur. (N. S.) 341; 27 L. J. (P. & M.) 41.

[3] Patten v. Poulton, 1 Sw. & Tr. 55 (1858); S. C. 4 Jur. (N. S.) 341; 27 L. J. (P. & M.) 41.

evidence in different ways, such as proving the existence of the instrument after the testator's death; by proving that he himself destroyed it when of unsound mind, or by error, or under force *sine animo revocandi*, or by proving that it was fraudulently destroyed by some other person; but under this last supposition the proof must be clear, because a fresh presumption arises — the presumption in favor of innocence; for if a fraud is charged, it must be clearly proved by facts and circumstances leading to a conclusion of guilt.

"All these presumptions, if they come to be analyzed, may be resolved into the reasonable probability of fact, deduced from the ordinary practice of mankind and from sound reason. Persons in general keep their wills in places of safety, or, as we here technically express it, 'among their papers of moment and concern.' They are instruments in their nature revocable; and if the instrument be not found in the repositories of the testator, where he had placed it, the common sense of the matter *prima facie* is that he himself destroyed it, meaning to revoke it; and if he destroyed the part in his own possession, the common sense of the matter again is that he also intended to destroy the duplicate not in his own possession.

"It was argued, on behalf of the executor, that the burthen of proof lay on the next of kin; that they must show affirmatively by evidence that the deceased himself destroyed the instrument. The doctrine is new, and no authority was given to support it; and the court cannot venture to adopt it without authority, and against authority. The passage quoted from Swinburn seems to be quite in the opposite direction."[1]

Sec. 59. **Declarations of testator.**— From the quotation just made it will be observed that declarations of the tes-

[1] Colvin v. Fraser, 2 Hagg. 266, 326, 327 (1829); Freeman v. Gibbons (1793), and Baumgarten v. Pratt (1796), cited; not reported. Also Limbrey v. Mason, 2 Comyns, 453; Burtenshaw v. Gilbert, 1 Cowp. 54.

tator, showing that no revocation has taken place, are admissible to rebut the presumption. A statute providing generally that no declaration shall be received to establish a revocation of a will applies only to a case where the will is produced.[1] In one case it was said: "The declarations of William Reeves on his death-bed, expressive of his belief of the existence of his will, and that it had been left in the hands of John McReary, Esq., who drew and was a subscribing witness thereto, if of sound mind at the time, would leave no doubt of the fact that he had not canceled it himself."[2] Many other cases follow the same line of reasoning.[3] Thus, the declarations of unchanged affection for the devisees and of unchanged intentions have much weight and tendency to overthrow the presumption,[4] even though made at any time between the time of the execution of the will and his death; but the later they are the more potent.[5] Mutilation is a revocation usually, but the testator's declarations at the time may overcome the presumption raised by the mutilation. Thus, an angry testator tore his will in pieces, but was prevented from farther doing so by a bystander and the entreaties of the devisee. The jury found he had no intention of revoking it, and the will was held valid.[6] If there is a doubt whether the testator tore it or a spoliator, his declarations afterwards made are admissible to overcome the presumption to prevent a failure of justice.[7]

The mere fact that the testator knows his will has been destroyed is not conclusive of a revocation; for the pre-

[1] Weeks v. McBeth, 14 Ala. 474 (1848).

[2] Reeves v. Booth, 2 Mills (S. C.), 334; S. C. 12 Am. Dec. 679.

[3] Weeks v. McBeth, 14 Ala. 474 (1848); Tucker v. Whitehead, 59 Miss. 594 (1882); Steele v. Price, 5 B. Mon. 58 (1844); Patterson v. Hickey, 32 Geo. 156 (1861); Foster's Will, 13 Phila. 567 (1877); S. C. 34 Leg. Int., 222; Youndt v. Youndt, 3 Grant, 140 (1861).

[4] Patten v. Poulton, 1 Sw. & Tr. 55 (1858); S. C. 4 Jur. (N. S.) 341; 27 L. J. (P. & M.) 41.

[5] Patterson v. Hickey, 32 Geo. 156 (1861).

[6] Doe v. Perkes, 3 B. & Ald. 489 (1820). See Knight v. Cook, 1 Lee, 413 (1753), where the pieces were pasted together and probated upon the filing of a single affidavit.

[7] Tucker v. Whitehead, 59 Miss. 594 (1882).

sumption may be rebutted by evidence of his declarations showing that he did not deem it a revocation,[1] as that it was not by his direction.[2] A declaration made seven months before his death, however, was held not to rebut the presumption of revocation.[3] "The ascertainment of this fact [that it was not revoked] will cast no light on the authentication of the copy, and is not preliminary to its introduction. The question in such case is whether the will, of which the proposed paper is a copy, was revoked, or did the testator at the time of his death believe and intend it to be in existence as a valid will."[4] This intention is best revealed by his acts and declarations which indicate them.[5] In speaking upon the admissibility and the weight that should be given such declarations it was said: "Declarations alone, unsupported by circumstances strongly marking their sincerity and confirming their probability, would of themselves be very unsafe and insufficient to repel the presumption of law. All declarations, where you are to rely on the exact words of a casual expression, are liable to be misapprehended — to be misrecollected — to be misrepresented; a slight bias in the mind of the hearer will render the apprehension and the recollection incorrect; the slightest alteration of the expression, by a word or almost a letter, may vary the whole import of the declarations; an alteration from 'I have' to 'I had' a will, would completely change the bearing of the words — the one signifying the existence of the will, the other its being no longer in existence; but, above all, the possible insincerity of declarations, particularly about wills, increases the danger of relying upon them. This has always been the doctrine not only of these courts, but of all other courts."[6] Again it was said: "Declarations, coupled with conduct and with acts, and

[1] Steele v. Price, 5 B. Mon. 58 (1844).

[2] Youndt v. Youndt, 3 Grant, 140 (1861).

[3] Collyer v. Collyer, 4 Dem. 53 (1886); S. C. 17 Abb. N. C. 828.

[4] Jaques v. Horton, 76 Ala. 238 (1884).

[5] Johnson's Will, 40 Conn. 587 (1874).

[6] Colvin v. Fraser, 2 Hagg. 266, 345, 346 (1829).

inconsistent with them, are of weight in proof of intention; declarations also, not depending upon the precise words of a particular expression, but connected with extended conversations, and more especially if not liable to much suspicion of insincerity, have greater effect; but even still more when made not upon a single occasion, but repeatedly in the course and current of confidential communications, such declarations are entitled to full attention."[1] So if it is proven that a will was once in existence, and no actual destruction is shown, the fact that no declarations of discontent are shown is evidence tending to show that it was not destroyed by the testator.[2] A will was stolen, and the testator drew up a draft for his solicitor to draw another, to be exactly like the one stolen. A witness wrote out a copy, and this, with the draft, was attached to the petition. This copy was admitted to probate until the original will was found.[3]

Sec. 60. **The testator's conduct may be considered.**— Perhaps the decision in Lord St. Leonards' case affords us the best example on the subject under consideration. In the argument of that case in the Court of Appeals, in answer to the assertion that the presumption of revocation was not sufficiently rebutted, Chief Justice Cockburn says: "You must take into account the improbability of a man like Lord St. Leonards destroying his will and doing so with the intention of dying intestate. I agree with you that we are not to presume crime; but on the other hand we are not to presume imbecility. In substance, we have Lord St. Leonards down to the very last moment of his life saying, 'I have made all the testamentary dispositions which a careful man ought to make, which a father ought to make for his family, and I die in peace with that conviction.' Are we to discard all that, and simply, upon the

[1] Colvin v. Fraser, 2 Hagg. 266, 362 (1829). See Mynn v. Robinson, 2 Hagg. 169, 187 (1828).

[2] Scoggins v. Turner, 98 N. C. 135 (1887); S. C. 3 S. E. Rep. 719. See Page v. Maxwell, 118 Ill. 579 (1886); S. C. 8 N. E. Rep. 852.

[3] Goods of Hilliard, 26 L. T. 228 (1856).

ground that crime is not to be presumed, to say that the will must have been destroyed by him?" The reference to a crime will appear farther on in the quotations herein made. In delivering his opinion the Chief Justice said: "The will was last seen on the 20th of August, 1873; the death of the testator took place on the 29th of January, 1875. The will was kept in a small box placed on the floor of a room called the saloon, on the ground floor of the testator's house. Upon his death it was looked for in that box by the solicitor employed by the executors, and it could not be found. . . . Now, where a will is shown to have been in the custody of a testator and is not found at his death, the well-known presumption arises that the will has been destroyed by the testator for the purpose of revoking it; but of course that presumption may be rebutted by the facts. Although *presumptio juris* it is not *presumptio de jure;* and of course the presumption will be more or less strong according to the character of the custody which the testator had over the will." After discussion of the question of custody, from which a quotation is made in full elsewhere,[1] the chief justice proceeded:

"Next comes the question whether it is not probable that the will should have been destroyed by the testator, and here we must look at the position and character of the man. It would be difficult to find a more methodical man of business than the late Lord St. Leonards; it would be difficult to find any one who had a deeper sense of the importance of testamentary dispositions. We find that between 1867 and 1873 he made no less than two wills and eight codicils. He always exhibited the greatest possible anxiety to make a proper provision for the members of his family, and more especially for his daughter, Miss Sugden, for whom it is quite clear that he entertained the warmest and fondest affection, and who would be left wholly unprovided for in the absence of testamentary provision made in her favor. He upon all occasions expressed a deep sense of

[1] Sec. 65.

the duty which every man ought to act upon of making testamentary provision for those who were dependent upon him. We know, also, although of course we might have presumed it independently of any specific knowledge of the fact, that he was quite alive to the danger of destroying one will with the view of making another, and of the necessity of making a will, as it were, *uno flatu*, to prevent the possibility of any question arising as to his intention. It must be remembered that it is in evidence that upon two occasions when he was making his will, in 1867 and 1870, there was the greatest difficulty in prevailing upon him to take refreshment, because he would not be interrupted in the work; and he gave as a reason that if anything should happen to him while the will was, as it were, in suspense, questions might afterwards arise upon it.

"Now, besides that, we have the fact that, from the time of making his will in 1870 down to the time of his death, he was in the constant habit of talking to every one with whom he came in contact — most certainly to all the inmates of the house with whom he was brought into daily contact — of the testamentary provisions he had made, expressing his satisfaction at what he had been able to do for the different members of his family, more especially for Miss Sugden, and at his having acquired by his own professional powers and exertions so large an amount of property. The possession of that property, the disposition of that property, and the satisfaction he felt at having made provision for the peerage which he had founded, and for the various members of his family who were dependent upon his bounty, seem to have been constant subjects of his thoughts, upon which his mind delighted to dwell, and also constant topics of his daily discourse with almost all the persons with whom he was brought into contact. It seems to me utterly impossible to suppose that, under these circumstances, such a man as Lord St. Leonards would voluntarily have destroyed this will, whether for the purpose of revoking it or making another, or for any other purpose that could be

conceived. My mind revolts from arriving at any such conclusion, and I feel bound to reject it."

The Master of the Rolls, Jessel, said: "Every act of his life which is proved, every statement made by him which is proved, in respect of his testamentary dispositions, to my mind point to but one conclusion; and to arrive at a contrary conclusion would be to believe that Lord St. Leonards not only spoke a lie but acted a lie to the last moment of his existence."

Sec. 61. **Examining contents of will.**— The President of the Probate Division, Sir J. Hannen, before the case was appealed, in speaking of the presumption of revocation and the questions involved, said that the latter had been reduced to two: (1) What were the contents of the will; and (2) was it revoked or destroyed by the testator *animo revocandi*. "Now it is necessary that I should deal with those questions in the order in which I have stated them, because it is obvious that the question whether or no the testator revoked this instrument must depend to a considerable degree upon what conclusion I may arrive at as to the contents of the instrument itself. It is obvious that where a will, shown to have been in the custody of a testator, is missing at the time of his death, the question whether it is probable that he destroyed it must depend largely upon what was contained in the instrument. Was it one arrived at after mature deliberation; did it deal with the interests of the whole family, carefully arranging the dispositions which he would make in favor of the several members of it; or was it the hasty expression of a passing dissatisfaction with some one or more of them? These are questions naturally having the strongest possible bearing upon the ultimate question which I may have to determine, namely, whether or not the testator himself destroyed this instrument."

After having determined at length what the provisions of the will were, the President said of it: "This appears to be a will well considered, dealing with the interests of a

large number of his family, settling certain estates upon the peerage, settling other estates upon his second son, accompanied by declarations of the testator to those interested, especially to the present Lord St. Leonards, that what he was about to do was the fixed determination of his mind; and I have to consider whether it is probable that he would at some subsequent time change the intentions which he had then formed. When it is suggested that such a change has come over the mind of the testator we must look for the cause of such a change."[1]

Sec. 62. **Declarations made at time of tearing will — Res gestæ.**—"The execution of the will being established, the next question is whether there was any evidence that it was canceled. On this point I lay no stress upon the declarations of the testator. They were made long after the execution of the will, and shortly before his death. They are not evidence unless they relate to the *res gestæ* or to an act done; as where, by mistake, the will is torn or thrown into the fire. The declarations of the testator are, in such case, evidence where they show the *quo animo*. The act of canceling is in itself equivocal, and will be governed by the intent. The rule is that if the testator lets the will stand until he dies it is his will; if he does not suffer it to do so it is not his will. It is ambulatory until his death. There must be a canceling *animo revocandi*. Revocation is an act of the mind, which must be demonstrated by some outward and visible sign of revocation. The statute has prescribed four. If any of them are performed in the slightest manner, joined with a declared intent to revoke, it will be an effectual revocation. The evidence here does not warrant any such intent. The testator, several months before his death, called for the will, and wished to add a codicil. There is no other act that indicates an intent to make the least alteration. No act was done or dissatisfaction expressed upon which to raise a presumption. The

[1] Sugden v. Lord St. Leonards, T. (N. S.) 372; 24 W. R. 479; 45 L. R. 1 P. D. 154 (1876); S. C. 34 L. L. J. (P. & D.) 49; 17 Moak, 453.

most that can be urged is that the testator expressed a desire to make some alteration by way of codicil, from which it is rather to be inferred that the general features of the will were approved, and that an additional or greater provision was contemplated for some of the objects of bounty. The conclusive answer is that all was inchoate. It rests merely in an intent expressed at one time, and to a single individual. We are left entirely to conjecture whether the testator ever afterwards did a single act to warrant the presumption of canceling the will, in whole or in part. I therefore consider the will as remaining in force at the testator's death."[1]

Sec. 63. **Statute — Number of witnesses.**— A statute provided that if a will be lost or destroyed subsequent to the death or without the consent of the testator, a copy of the same, clearly proved to be such by the subscribing witnesses and other evidence, could be admitted to probate and record in lieu of the original; but in every such case the presumption was of a revocation by the testator, and that presumption had to be rebutted by proof. It was "insisted that the contents of the will must be proved by three witnesses, and that the presumption of revocation, which was raised by law, must be rebutted by three witnesses." But this was not deemed a fair construction. "In our opinion, the true construction is that the execution of the will must be proved as above stated by the subscribing witnesses [if in life and within the jurisdiction of the court, as in case of probate of a will in solemn form]; and the destruction or loss of the will, and the facts necessary to rebut the presumption of revocation by the testator, may be proved by 'such other evidence' as satisfies the conscience of the jury that the will so executed or testified to by the subscribing witnesses was lost or destroyed since the death of the testator, or without his consent before his death."[2]

[1] Dan v. Brown, 4 Wend. 487, 490 (1825); S. C. 15 Am. Dec. 395.

[2] Kitchens v. Kitchens, 39 Geo. 168 (1869); S. C. 99 Am. Dec. 453.

SEC. 64. **Will in possession of another.**— If the will, after its execution, was placed in the hands of another, and so remained until after the testator's death, and on search is not found, the presumption of revocation, in many instances, is rebutted, unless circumstances are proved which overthrow the rebuttal or prevent its arising. It is the prevailing rule that if the will is not forthcoming at the death of the testator its revocation will be presumed, whether it was in his personal possession or in the possession of another; but in the latter instance the presumption is quite a weak one. It may be shown that the custodian had exclusive possession of the will, that the testator could not have obtained possession of it unless with the custodian's knowledge, and that to his knowledge the testator never had possession of it. In such a case the presumption of revocation, arising from the supposed destruction of the will, is rebutted; and that presumption is very much strengthened by showing declarations of the testator, down to near the time of his death, expressing satisfaction with the will.[1] "But that presumption [of revocation] is entirely overcome and rebutted when it appears that, upon the execution of the will, it was deposited by the testator with a custodian, and that the testator did not thereafter have it in his possession or have access to it."[2] The declarations of the testator are admissible to prove where he deposited his will.[3] If possession is shown to have been in a third person, or if the will is traced into the possession of a depositor, the burden of retracing the will into the testator's hands lies then upon those opposing its probate. Thus, it was said that those opposed to a will which had been traced to the possession of another, "who had been

[1] Hildreth v. Schillinger, 2 Stock. Ch. (N. J.) 197 (1854); Page v. Maxwell, 118 Ill. 579 (1886); S. C. 8 N. E. Rep. 852; Jackson v. Betts, 6 Cow. 377 (1826); Tynan v. Paschal, 27 Tex. 286 (1863); S. C. 84 Am. Dec. 619.

[2] Schultz v. Schultz, 35 N. Y. 653 (1866).

[3] Jackson v. Betts, 6 Cow. 377 (1826), citing Dan v. Brown, 4 Cow. 488 (1825); S. C. 15 Am. Dec. 395.

intrusted with the keeping and preservation of it," "must show to your [the jurors'] satisfaction that it came again into her own possession, or was actually destroyed by her direction, or it will not be held or presumed to be revoked by her, but will be deemed to remain unrevoked by her." [1] So if it is shown that the testator had possession of the will, and while having it within his manual control was taken sick and so confined to his room that he could not leave it, and after such confinement made declarations which show that he then thought his will was in existence and he was satisfied with it, the presumption of revocation is rebutted, unless it is further shown that it was brought to him and he destroyed it or had an opportunity to do so.[2]

Sec. 64*a*. **War.**— A. made his will in 1855. In May, 1857, he was driven from Delhi, India, where he resided at the time of the execution of his will, by the Indian mutiny war. He left his will there and died in the next month, June. On an affidavit of an attesting witness as to its due execution and contents, together with the widow's affidavit as to the contents, probate of the will was granted.[3]

Sec. 65. **Charge of fraudulent destruction — Presumption — Possession.**— A destruction by a third person is not to be presumed; for it is a fraudulent destruction, and fraud

[1] Dawson v. Smith, 3 Houston (Del.), 335 (1866).

[2] Sugden v. Lord St. Leonards, *supra;* Foster's Appeal, 87 Pa. St. 67 (1878); S. C. 1 Am. Prob. Cas. 435; 30 Am. Rep. 340. The facts in the Pennsylvania case are very similar to those in Knapp v. Knapp, 10 N. Y. 276 (1851), and a decision in the latter case was made diametrically opposed to the former. In the New York case it was proved that a month before the alleged testator's death he said his will was then in a certain desk at his residence. He was then eighty years of age and very infirm. His daughter was his housekeeper and had an interest against the will. At his death, after proper search made three days thereafter, it could not be found. It was held that the evidence was not sufficient to overcome the presumption of revocation, nor to prove that it was in existence at his death, nor to show a fraudulent destruction in his life-time. The case certainly draws a wrong conclusion from the facts proved, and cannot be accepted as an authority on this point.

[3] Goods of Gardner, 1 Sw. & Tr. 109 (1858); S. C. 27 L. J. (P. D.) 55.

is not presumed.[1] If it is charged that an interested person destroyed it, the interest and an opportunity to destroy it must be affirmatively shown; for the court will not presume that a practical custodian, by reason of the bare custody, destroyed it.[2] In case of a charge of spoliation, stronger evidence to rebut the presumption of revocation is required than on a bare charge of loss; for in such a case the presumption of innocence of the charge must also be overcome;[3] but as we have said elsewhere, if the spoliation is clearly proved, many things will be presumed that otherwise would not be.[4] Where a will had been seen in the testator's custody and could not be found in his depositories after his death, but there was evidence of his declarations recognizing its existence up to within three weeks of his death, and none of any change of an intention during those three weeks; and the only person who was interested in its destruction had access to and made search in the depositories before they were searched by any other person,— these facts, coupled with the non-appearance of the person interested in its destruction, were held sufficient to rebut the presumption of a revocation.[5] In this connection arises the question of an exclusive possession in the testator; for if it was an exclusive possession, stronger evidence of its non-revocation will be required than if it were not. If others had access to it, especially if it was to their interest to have it destroyed, slighter evidence to overcome the presumption of revocation will then prevail. The illustration just given is an instance of this kind. Another was, where the entire family of the testator had access to the trunk where he kept it, and his declarations of satisfaction with his will were proved up to near his death,— it was established; for the will

[1] Hatch v. Sigman, 1 Dem. 519 (1883).

[2] Jones v. Murphy, 8 W. & S. 275 (1844).

[3] Wargent v. Hollings, 4 Hagg. 245 (1832); Loxley v. Jackson, 3 Phil. 126 (1819); Helyar v. Helyar, 1 Lee, 472 (1754).

[4] Sec. 94.

[5] Finch v. Finch, L. R. 1 P. & M. 371 (1867); S. C. 36 L. J. (P. & M.) 78; 16 L. T. 268; 15 W. R. 797.

was not an equal one, and it was to the interest of some of the members of the family that it be destroyed.[1]

In speaking of the custody of the will, Chief Justice Cockburn, in the case already quoted from at length, said: "Now here we have to observe that the custody was anything but a close custody. The box was kept in a room on the ground floor, common not only to the inmates of the house but to any one who had obtained access to it. It was kept in a common box, easily opened, and the key was kept in an escritoire not always under lock and key. It is in evidence that, of the different keys in the house, there were no less than five by which the escritoire might be opened, and the will was, no doubt, known to the inmates of the house, or to those who had been its inmates, as being kept in this box; for, as a matter of fact, Lord St. Leonards was constantly, or at all events frequently, engaged in making wills or codicils, testamentary dispositions of one sort or another, and upon all these occasions some of the servants of the house were called in to witness the execution of the testamentary document, and therefore would well know that the box was the place for the deposit of the testamentary papers of Lord St. Leonards." Proceeding further he said: "Now the last time the will was seen was by Miss Sugden, on the 20th day of August, 1873. Lord St. Leonards was taken ill in September, 1873, and was confined to his room from that time to Christmas, 1873, and during the whole of that time the box was kept by Miss Sugden, as she tells us, in her own room; when he again rejoined the family down stairs she replaced the box in the saloon that he might not miss it, and it remained there until his last illness commenced in March, 1874. It was then again taken possession of by Miss Sugden and kept by her until Lord St. Leonards' death; therefore it

[1] McBeth v. McBeth, 11 Ala. 596 (1847); Weeks v. McBeth, 14 Ala. 474 (1848); Foster's Appeal, 87 Pa. St. 67 (1878); S. C. 1 Am. Prob. Cas. 435; 30 Am. Rep. 340; Knapp v. Knapp, 10 N. Y. 276 (1851). See comments on this case, sec. 64, note.

could only have been got at by him between Christmas, 1873, and March, 1874. Long after March, when he was stricken with his last illness, and from which time he was confined to his own bed-room, he again and again referred to the various provisions he had made by the will — in other words, referred to the will itself as still subsisting; and this again adds to the vast improbability of his having destroyed the will. The only conclusion I can arrive at is, not that he destroyed it, but that it was clandestinely got at by somebody and surreptitiously taken away; who that somebody is is one of those mysteries which time may possibly solve, but which at present it would defy human ingenuity to say." [1]

Sec. 66. **Declarations to show a revocation.**— It is laid down broadly that the declarations of the testator to show a revocation are not admissible for that purpose; for the law has provided ways in which a will may be revoked, and these must be pursued; [2] but his declarations made at the time he destroys his will and in connection therewith are admissible to show his intent in doing so. Thus, a testatrix destroyed her will, stating at the time her intention in doing so. Subsequently, on the same day, she said she destroyed the will with the intention of reviving a former will. Under the circumstances the court refused to probate a draft of the destroyed will.[3] But, as has elsewhere been stated,[4] his declarations of having destroyed or revoked his will are admissible to strengthen the presumption of revocation, and to rebut the evidence given to overthrow such presumption.[5] But, notwithstanding declarations of dissatisfaction and declarations of having destroyed the will, it may be set up when such declarations are manifestly false.[6]

[1] Sugden v. Lord St. Leonards, *supra*.

[2] Jackson v. Kniffen, 2 Johns. 31 (1806).

[3] Goods of Weston, L. R. 1 P. & D. 633 (1869).

[4] Sec. 46.

[5] Weeks v. McBeth, 14 Ala. 474 (1848).

[6] Hildreth v. Schillinger, 2 Stock. Ch. (N. J.) 197 (1854).

Sec. 67. **Filling blanks — Striking out clauses.**— Where a testator struck out several clauses after he had executed his will, parol evidence was admitted to show that fact, and his will as executed was probated.[1] But where it was claimed in the case of a lost will that certain blanks were left in the will as executed, and these were filled out when the will was produced for probate, it being possible from the evidence that these blanks were filled out either before or after its execution, it was held that the presumption of law was in favor of the right time to make the instrument valid, and that the blanks were filled when it was executed.[2]

Sec. 68. **Duplicate wills — Copies.**— Occasionally a will, as a matter of precaution, is made in duplicate — one copy left with a holder for safe keeping, and the other retained by the testator. This seems to be the practice in England much more than in this country. When such a thing is done, and on the death of the testator the copy he retained is not forthcoming, the presumption is that it was destroyed by him *animo revocandi*,[3] and the duplicate is also canceled.[4] Where a testator executed his will in duplicate, retained one copy and placed the other on deposit in India, where it was executed, on his dying in England probate of the copy was refused, the copy he had retained not being forthcoming.[5] But this presumption of revocation may be rebutted the same as in any other case. Thus, a testator executed his will and left it with his solicitor, taking a copy with him and going abroad in the army. He never returned. Upon testimony showing that the will never

[1] Quinn v. Quinn, 1 T. & C. 437 (1873).

[2] Graham v. O'Fallon, 4 Mo. 601 (1835).

[3] Pemberton v. Pemberton, 13 Ves. Jr. 290 (1807).

[4] Richards v. Mumford, 2 Phil. 23 (1812); Burtenshaw v. Gilbert, 1 Cowp. 54 (1774); Lindsey v. Mason, 2 Comyns, 453; Onions v. Tyrer, 1 P. Wms. 343 (1716); Goods of Haines, 5 N. of Cas. 621 (1847); Boughey v. Moreton, 3 Hagg. 191, note (1758). See Saunders v. Saunders, 6 N. of Cas. 519 (1848).

[5] Colvin v. Fraser, 2 Hagg. 266 (1829).

left the solicitor's possession, who was dead, that the original could not be found, the copy was admitted to probate.[1] Where a testator, having executed his will in duplicate, gave one copy to his wife, retaining the other, and the wife's copy was not forthcoming at his death, it was held that the copy produced was the one he kept, and that there was no revocation.[2]

SEC. 69. **Change of situation — Poverty of child.**— "So I apprehend on a question of revocation arising from an equivocal act of a testator leaving it doubtful whether the act was done *animo revocandi*, or where the will cannot be found at the testator's death, the party claiming in opposition to the will may give evidence of such changes in the property of the testator, or in the situation of his family, as might have furnished a reasonable motive for the revocation." But proof of the poverty of one of the testator's children, who took nothing under the lost will, is not admissible to strengthen the presumption of revocation arising by reason of the will not being found, unless there is such a change as above indicated.[3]

SEC. 70. **Examples — Presumed continuance of will.**— A testator, in a fit of *delirium tremens*, tore his will in pieces, which were preserved by others. On his recovery he was informed of what he had done, and he answered that he must have been mad when he tore the will; that he would make another one, which intention he did not carry out. It was held that the will was not revoked.[4] Where a will was found in sheets, scattered through the rubbish contents of a barrel in an out-of-the-way place, twenty-five years after the testator's death, with a piece torn out of one of the pages, the presumption was held to be that it was revoked.[5] The testator was seen once or twice to take

[1] Goods of Pechall, 6 Jur. (N. S.) 406 (1860).

[2] Snider v. Burke, 84 Ala. 53 (1888); S. C. 4 So. Rep. 225.

[3] Betts v. Jackson, 6 Wend. 173 (1830).

[4] Brunt v. Brunt, 3 P. & D. 37 (1873); S. C. 5 Moak, 530, citing Borlase v. Borlase, 4 N. of Cas. 106, 139.

[5] Lawyer v. Smith, 8 Mich. 411 (1860); S. C. 77 Am. Dec. 460. See

papers from his desk and burn them. Once he took something looking like papers to another and distant place, acting shyly about it. This was held not to warrant a belief that the will was destroyed. "If it had been perceived even that the will was taken from the desk by the testator, it would be no evidence of its subsequent destruction. But to proceed a step further, and contend that an unknown paper was taken, that the will was that paper and must have been canceled, appears to my mind a gratuitous assumption not warranted by the testimony."[1] It was also ruled at the hearing of this case "that if the will was duly executed, and once an existing will and in the hands of the testator, unless there be evidence of its having been canceled or revoked by the testator, the law presumes its continued existence to the time of his death." Of this rule it was said, "that this is a principle of the common law seems to me well settled by authority." But on appeal the case was reversed on this latter point, and it was declared that there was no such presumption of the continuance of the will.[2] The ruling on this point, however, does not affect the first one stated in the case, if it is borne in mind that the mere absence, unaccounted for, of the will at the testator's death raises a presumption of revocation; for if that presumption was rebutted, the acts detailed would not reestablish it.

In a New York case it was said: "There is no direct proof that Mrs. Collyer destroyed her will. But the proof that the will was not found after her death is sufficient proof that she destroyed it *animo revocandi.* When a will previously executed cannot be found after the death of the testator, there is a strong presumption that it was revoked by destruction by the testator, and this presumption stands in the place of positive proof. He who seeks to establish a

White's Will, 25 N. J. Eq. 501 (1874).

[1] Jackson v. Betts, 9 Cow. 208 (1828).

[2] Betts v. Jackson, 6 Wend. 173 (1870).

lost or destroyed will assumes the burden of overcoming this presumption by adequate proof. It is not sufficient for him to show that persons interested to establish intestacy had an opportunity to destroy the will. He must go further and show by facts and circumstances that the will was actually fraudulently destroyed. In Loxley v. Jackson[1] the will was last seen in a small box in the bed-room of the deceased, but was not found after her death; and it was held that the presumption of law was that the testatrix destroyed it *animo revocandi;* that the law did not presume a fraud; and that the burden of proof was on the party claiming under the will.

"In Betts v. Jackson[2] a will was duly executed and in the custody of the testator for five years afterwards and within ten months previous to his decease, but could not be found after his decease; and it was held that the legal presumption was that the testator had destroyed it *animo revocandi*, although it appeared that within a fortnight before his death he applied to a scrivener who had drawn a codicil to draw another codicil to his will; which, however, was not drawn, nor was the will at the time produced to the scrivener. In Knapp v. Knapp[3] it was held that proof that a will executed by a deceased person was said by him, a month previous to his death, to be in his possession in a certain desk at his house; that he was then very aged and feeble; that his housekeeper was a daughter having an interest adverse to the will; and that the same could not be found on proper search three days after his death,— is not sufficient evidence of the existence at the testator's death or of a fraudulent destruction in his life-time to authorize parol proof of its contents."[4]

[1] 3 Phil. 126.

[2] 6 Wend. 173.

[3] 10 N. Y. 276.

[4] Collyer v. Collyer, 110 N. Y. 481 (1888); S. C. 18 N. E. Rep. 110. We have no hesitancy to say that this last case was wrongly decided, and that the proof was sufficient to show that it had never been canceled or destroyed *animo revocandi.* See Foster's Appeal, 87 Pa. St. 67; S. C. 1 Am. Prob. Cases, 434; 30 Am. Rep. 340, which immediately follows.

"There is ample evidence to rebut the presumption of a revocation by the testator. Many facts contribute to this result, among which these leading circumstances appear: Isaac P. Foster was never without a will for the last fifteen years of his life, having had seven written under the supervision of counsel, and made necessary by the nature and amount of his estate, the number of his children, and advancements made to some, and those matters were often dwelt upon by himself. He himself regarded his will of 1875 as existing until and while lying on his death-bed, when too feeble to destroy it without assistance. Up to this time he made efforts to procure a codicil to alter the will in a certain aspect, made necessary by a failure in the payment of interest on certain bonds, but, being prevented by the extremity of his last illness, died under the belief that he had arranged with his executors to pay these legatees money instead of bonds. These and corroborating circumstances show that the testator had no thought of a revocation. That the presumption of a personal revocation can be thus rebutted is shown by the authorities cited by the appellees. The presumption of revocation arises from the fact that the will was known to be in the possession of the testator himself, and that it cannot be found after his death. It is therefore a natural presumption merely, because it cannot be supposed the testator would part with it unless he intended to put it out of the way; and because it is out of the way and cannot be accounted for, the presumption that he intended to revoke it arises. Like other natural presumptions drawn from evidence, and not declared *de jure* for some legal end, it must give way to stronger evidence of the continued existence of the will, and the testator's reliance upon it as the disposition he had made of his property."[1]

Sec. 71. **Sufficiency of evidence to overcome presumption.**— To rebut the presumption that the testator destroyed

[1] Foster's Appeal, 87 Pa. St. 67 (1878); S. C. 30 Am. Rep. 340; 1 Am. Prob. Rep. 435.

his will *animo revocandi*, it is said that the evidence must be such "as produces a moral conviction to the contrary."[1] The evidence on this point must be clear and satisfactory.[2] And it was said, "nor does it require evidence amounting to positive certainty, but only such as reasonably produces moral conviction."[3] In case of a charge of spoliation, such charge must be supported by stronger evidence than in case of a loss.[4]

SEC. 72. **Burden on propounder.**— "It is incumbent upon a party who seeks to establish a will to repel that presumption [of revocation], and show that it was improperly destroyed."[5] This is especially true in cases of fraud, that is, to establish the fraud.[6]

SEC. 73. **Question for jury.**— Whether or not the presumption of revocation is rebutted is a question for the jury, or for the court when tried by it.[7] In case of a charge that the will was lost, before the jury can find for it they must find that it was in fact lost.[8]

SEC. 74. **Pleading.**— The petition must contain an allegation that the will was unrevoked and uncanceled at the death of the testator, to which, of course, the proof must conform.[9]

[1] Foster's Will, 13 Phila. 567 (1877); S. C. 34 Leg. Int. 222.

[2] Eckersley v. Platt. L. R. 1 P. & D. 281 (1866); S. C. 36 L. J. (P. D.) 7; 15 W. R. 232; 15 L. T. 327.

[3] Davis v. Davis, 2 Addams, 223 (1824). Opinions and mere suspicions cannot overcome the presumption of revocation. Fuentes v. Gaines, 24 La. Ann. 85 (1873). There is no particular standard; each case is judged on its own peculiar circumstances. Sugden v. Lord St. Leonards, *supra*.

[4] Wargent v. Hollings, 4 Hagg. 245 (1832).

[5] Idley v. Bowen, 11 Wend. 227 (1833); Welch v. Phillips, 1 Moo. P. C. 299 (1836); Scoggins v. Turner, 98 N. C. 135 (1887); S. C. 3 S. E. Rep. 719; Tynan v. Paschal, 27 Tex. 286 (1863); S. C. 84 Am. Dec. 619.

[6] Idley v. Bowen, 11 Wend. 227 (1833); Betts v. Jackson, 6 Wend. 173 (1830).

[7] Dawson v. Smith, 3 Houston (Del.), 335 (1866).

[8] Morris v. Swaney, 7 Heisk. 591 (1872).

[9] Newell v. Homer, 120 Mass. 277 (1876).

CHAPTER VII.

PROOF OF CONTENTS.

Sec. 74*a*. **Order of proof — Burden.**— The next order of proof is that of the contents of the lost will,[1] which must be proved substantially as alleged;[2] and the burden of proving the contents is on the propounder.[3]

Sec. 75. **Secondary evidence — Parol — Production of original.**— "The proof of a lost or destroyed will proceeds upon the theory that it is not in existence and cannot be produced before the surrogate, and therefore the case is one of secondary evidence exclusively."[4] "We do not doubt that parol evidence of the contents of a will lost or mislaid may be received. Such secondary evidence is admissible in cases of deeds and records lost or destroyed, and wills have been established on the same evidence."[5] "I see no difference in this respect between a deed and a will. It would be cause of great injustice if the accidental or fraudulent destruction of such an instrument should deprive parties interested of the right to give evidence of their contents."[6] In another case the question was discussed more at length, wherein it was affirmed that such a proceeding could not be characterized as the making of a will for the deceased. It was said: "The will then being in existence at the death of the testator, unrevoked by him, its loss or accidental destruction differs not from the loss or

[1] Morris v. Swaney, 7 Heisk. 591 (1872); Podmore v. Whatton, 3 Sw. & Tr. 449 (1864); S. C. 33 L. J. (P. & D.) 143; 10 L. T. 754; 13 W. R. 106.

[2] Mahood v. Mahood, 8 Ir. Eq. 359 (1874).

[3] Newell v. Homer, 120 Mass. 277; Davis v. Sigourney, 8 Met. 487 (1844); Durfee v. Durfee, 8 Met. 490, note (1844).

[4] Everitt v. Everitt, 41 Barb. 385 (1864).

[5] Davis v. Sigourney, 8 Met. 487 (1844).

[6] Clark v. Wright, 3 Pick. 67 (1825).

destruction of any other solemn instrument, such as a deed, a note or bond or a record. The contents, therefore, may be proved in like manner, as shown by the authorities cited. It is a postulate of the question that the testator left behind him at death a last will in writing, legally executed and published, unrevoked by any act or direction of his. That the law will not tolerate any making of a will for him by other means than his own act in writing duly executed is clear. But such a will having a legal existence, yet accidentally lost or destroyed, the establishment of its contents is not the making of a new will, but a restoration merely of that which the testator himself made and left behind him to govern his estate. There is no greater sanctity in this respect than the restoration by parol evidence of other instruments equally solemn and having an equal effect in the disposition of property. The law simply comes in aid of his own legally performed act, to prevent his intentions from being frustrated or defrauded."[1]

These quotations are abundantly supported by the authorities, affirming that parol evidence in such instances is admissible to prove the contents of the lost or destroyed will.[2] Where a will was torn in pieces by the testator's son after his father's death, the pieces were put together and oral evidence to identify them was also admitted.[3] If an unprobated will may be used in evidence, as in an action for partition, parol evidence of its contents, when it is lost or destroyed, is admissible, the execution being shown and the presumption of revocation being rebutted.[4]

[1] Foster's Appeal, 87 Pa. St. 67 (1878); S. C. 30 Am. Rep. 340; 1 Am. Prob. Rep. 435.

[2] Harris v. Tisereau, 52 Geo. 153 (1874); S. C. 21 Am. Rep. 242; Reeves v. Booth, 2 Mills (S. C.), 334 (1818); S. C. 12 Am. Dec. 679; Timon v. Claffy, 45 Barb. 438 (1865); Southworth v. Adams, 11 Biss. 256 (1882); Dawson v. Smith, 3 Houst. (Del.) 335 (1866); McBeth v. McBeth, 11 Ala. 596 (1847); Gaines v. Hennen, 24 How. 553 (1860); Burge v. Hamilton, 72 Geo. 568 (1884).

[3] Foster v. Foster, 1 Addams, 462 (1823).

[4] Reeves v. Booth, 2 Mills (S. C.), 334 (1818); S. C. 12 Am. Dec. 679.

Sec. 76. **Best evidence — Copy.**— In one case it was said that the best evidence must be produced, and that a copy was better than parol evidence.[1] In another it was said that the copy must be produced;[2] while in another it was said only that a copy is the best or better evidence than parol evidence — which statement no one will contradict.[3] And it is undoubtedly true that a copy, after it is shown to be accurate, may be introduced to prove the contents of the original.[4] But the production of a copy does not dispense with the preliminary evidence of execution and to rebut the presumption of revocation.[5] In the one case it was said that the copy was admissible, and the sufficiency of the search, proof of its execution, whether destroyed or canceled or lost by accident, etc., "is a question not going to the admissibility of a verified copy, but a fact to be determined by the jury, if there be one, on a consideration of all the circumstances proved."[6] But there is no presumption that such a copy was made, and the propounder is not bound to show that such was the fact. It would, however, impose no burden on him to be first required to show that he found no purported copy of the will. Yet the writer is inclined to think that an objection to the admission of oral evidence would not lie for the reason that no evidence had been produced to show there was no copy known to the propounder to be in existence. The production of a copy does not, however, exclude oral evidence of the contents of the will. Nor is a failure to prove an alleged copy to be in fact such, sufficient to defeat the

[1] Apperson v. Dowdy, 82 Va. 776 (1887); S. C. 1 S. E. Rep. 105.

[2] Morris v. Swaney, 7 Heisk. 591 (1872).

[3] Happy's Will, 4 Bibb, 553 (1817).

[4] Wilbourn v. Shell, 59 Miss. 205 (1881); Apperson v. Cottrell, 3 Port. 51 (1836); S. C. 29 Am. Dec. 239; Goods of Thornton, 2 Curteis, 913 (1841); Polmore v. Whatton, 3 Sw. & Tr. 449 (1864); S. C. 33 L. J. (P. & D.) 143; 10 L. T. 754; 13 W. R. 106; Jaques v. Horton, 76 Ala. 238 (1884); Goods of Pechell, 6 Jur. (N. S.) 406 (1860); Everitt v. Everitt, 41 Barb. 385 (1864); Forbing v. Weber, 99 Ind. 588 (1884); Colvin v. Fraser, 2 Hagg. 266 (1829).

[5] Goods of Pechell, 6 Jur. (N. S.) 406 (1860).

[6] Jaques v. Horton, 76 Ala. 238 (1884).

probate. "Although the proponent produced a paper purporting to be a copy, and it may be expected that she was prepared to establish it, if she is unable to do so, she may abandon the attempt, and prove the contents by competent parol evidence. The failure to prove the copy, under the circumstances, is a matter to be considered in weighing the evidence, and determining its credibility and sufficiency."[1] Whether or not the copy should be verified by affidavit depends upon the local practice. Usually there is no harm in admitting a copy thus verified; but witnesses may be called and by oral testimony identify the copy, and it may then be introduced.[2] If a will has been probated and the record and original destroyed, parol evidence is admissible, and a copy cannot be demanded.[3] Even at an early day, when there was no statute making the probated copy admissible in evidence if the original was lost, such copy was evidence.[4] A will made and attested in Queensland was proved and lodged in the supreme court of New South Wales, at Sidney. The executor, having applied for probate in Ireland, proved by one of the attesting witnesses, to whom only a copy was exhibited, its due execution, and upon the joint affidavit of a solicitor and an officer of the court of Sidney that they had inspected the will there, and had set out a true copy of it in the affidavit, and on proving the handwriting and signatures of the testator and attesting witnesses to the original, there being no suspicious circumstances attaching to the will, it was ordered probated.[5]

SEC. 77. **Copy required by statute — Sufficiency of evidence.**— In some states, before a lost or destroyed will can be probated or established, it is provided by statute that

[1] Jaques v. Horton, 76 Ala. 238 (1884).

[2] Apperson v. Cottrell, 3 Port. (Ala.) 51 (1836); S. C. 29 Am. Dec. 239.

[3] Apperson v. Dowdy, 82 Va. 776 (1887); S. C. 1 S. E. Rep. 105. See Brady v. Walls, 17 Gr. Ch. (Canada) 699 (1871).

[4] Jackson v. Lucett, 2 Cai. 363 (1805).

[5] Wilson v. Callum, L. R. 9 Ir. Eq. 150 (1882).

"the provisions shall be clearly proven by two witnesses, or by a correct copy and the testimony of one witness."[1] In New York a similar statute is in force, and it was held that a copy made by a third person is competent evidence, and complies with the requirements of the statute.[2] In Indiana a testator took his will to the office of the county for the record of deeds and mortgages and had it recorded. This copy was held to be admissible in evidence. "We think that the copy found of record was such as complies with the requirements of the statute. It is immaterial for what purpose the copy was made; for if the copy is an accurate one, it is sufficient under the statute. When it is shown, as it was here, that the will was executed and deposited for record, and that it was copied in one of the books of record, and this record was read, there was evidence as to its contents independent of the copy itself. This evidence came from more than one witness. It came from the deputy-recorder who copied the will into the records, from the witness who went with the testator to the recorder's office, from the witness who testified that the copy was a true one, from the witnesses who testified that the testator told them that the will had been deposited by him for record, and from the witness who testified that the original was taken by the testator from the office of the recorder after it had been recorded. Where a copy is shown to be a true one by the testimony of one witness, and where it is shown to have been copied by the person with whom it was deposited by the testator and by his direction, we do not believe it was necessary to prove the exact contents by any other witness, but that it is sufficient if some other witness state in general terms the provisions of the instrument. The record of the will was not competent evidence as a record, for the will was not entitled to go upon record, but it was competent for the purpose of exhibiting a copy of the instrument. It did not have the force of a record,

[1] R. S. of Indiana, 1881, sec. 2609. [2] Everitt v. Everitt, 41 Barb. 385 (1864).

but it did exhibit a copy of the will, and, when proper supplementary testimony was given by the person who made the copy, the instrument as copied was properly read in evidence."[1]

Sec. 78. **Draft.**— It occasionally happens that the persons who drew the bill first made a draft of it, and preserved this draft. This is evidence a grade lower than that of a copy; for the latter is supposed to be word for word with the original, while the former is only its outlines, although it may be shown to be an exact copy, or that the original was copied word for word from it. This draft is not admissible without setting forth how the original was lost.[2] But "the draft would not, in any such case, be valid as a draft; it would only be evidence of the contents of a valid will."[3] If both a draft and parol evidence as to the contents are put in evidence, the two must be placed side by side, and out of them the court will extract the contents of the will proved.[4] In one instance the draft was held sufficient evidence of the contents.[5]

Sec. 79. **Memoranda made by testator.**— Memoranda, made by the testator, of the contents of his will, or of a part of it, are admissible in evidence to prove the contents.[6] Lord Sugden's case affords the most striking example of this kind of which there is any instance on record. In that case the codicils were found, and these were used not only to corroborate the testimony of the witness testifying to the contents, but to prove the contents of the will. In the will-box along with these codicils were found several memoranda in the handwriting of the testator. They were papers "which were found in the will-box, evi-

[1] Forbing v. Weber, 99 Ind. 588 (1884).

[2] Pinhallow v. Robinson, 3 Hagg. 189, note (1723); Lillie v. Lillie, 3 Hagg. 185 (1829).

[3] Colvin v. Fraser, 2 Hagg. 266 (1829).

[4] Burls v. Burls, L. R. 1 P. & D. 472 (1868).

[5] Wyckoff v. Wyckoff, 1 C. E. Gr. 401 (1863).

[6] Foster's Will, 13 Phila. 567 (1877); S. C. 34 Leg. Int. 222.

dently placed there by him to be seen and dealt with in connection with his testamentary papers, and which bear internal evidence of having been drawn up, as Miss Sugden says they were, while he was in the act of preparing his will. She has described the mode in which those papers were used, and I think it clear that they do represent what Lord St. Leonards intended to do at the time when he was drawing the will in question. No doubt, as Dr. Deane has said, they do not in themselves prove that what is there jotted down was embodied in the will; but, having regard to the manner in which they were deposited with the other papers, they lend corroboration, and, as it seems to me, strong corroboration, to Miss Sugden's statement as to the several legacies, particulars of which, in fragments, appear on these papers." The court then proceeds to analyze the following memoranda, in the testator's handwriting, which were admitted in evidence:

"J."

	Legs.	*Kingswood.*
C.	750	F. £300 a yr.
	6,000	
S. Cd.	200	Rt. M. Q. A. B.
Her dau	100	Legs.
Aug.	300	~~other~~ Estates.
Girls	450	£150 p. ann. 3 Girls.
Ht.	240	
Florence	200	
Jt. P.	100	
	200	
	8,540	

Exps.	2,000 Jt.		
Debts, etc.	2,500 Exps.	Persl. est.	21,240
	1,000 Debts, etc.		14,040
	5,500	Surplus.	7,200
	8,540	Edwd.	720
	£14,040		£6,480

	March, 1870.		
Equitable	10,000		
Do. say	200		
Railway	3,000		
Do	800		
Turkish bonds	3,420		£4,000
India, 5 p. Ct	1,120		10,000
Balce. at Bankers	1,100		1,200
Arrears of rent, say	2,000		
	20,640		600
Arrears of pension, say	600		9,500
	21,240		15,100

Sec. 80. **Use made of the above memoranda.**— Of this memoranda the court made the following use: "In paper 'J' the late Lord Leonards has enumerated on the one side the various legacies which he evidently contemplated introducing into his will, and the first is 'C. £750,' and no one has doubted that that means Charlotte, £750. That, therefore, as it seems to me, is a corroboration of Miss Sugden's statement that the will did contain this bequest: 'I also give the sum of £750.' Under the initial of 'C.' are the figures £6,000. That, I take it, is a corroboration of Miss Sugden's statement that the will contained this bequest: 'I give to my daughter Charlotte a legacy of £6,000, which I direct to be paid out of the policy moneys of £10,000 issued on my life.' The next is 'S. Cd., 200.' That confirms this paragraph in Miss Sugden's statement: 'I give £200 to my daughter Sophia Cleveland, and £100 to her daughter.' In the will as put forward by Miss Sugden it is £100 to her daughter Sophia, but it does not go on to say anything about a gold watch and chain. There was an inaccuracy with regard to this in Miss Sugden's original statement; but I shall deal with those several inaccuracies by themselves, and therefore now pass on to those several bequests as they appear in exhibit 'J.' The next is 'Aug.,' which evidently is intended for Augusta, '£300.' Then 'Girls, £450.' Then

'Ht.,' which is evidently intended for Harriet, '£200.' 'Florence, £200.' 'Juliet P.,' which is intended for Juliet Pearson, '£200.' And then there is another sum of £200, which is unappropriated by any initial put to it by Lord St. Leonards, but which Miss Sugden says was £200 to her sister Caroline Turner. Then we have 'Expenses and debts;' and opposite expenses is '£2,000, Jt.' That corroborates Miss Sugden's statement that the will contained this provision: 'I further direct that my executor pay the sum of £2,000 to the trustees of the settlement of my daughter Juliet, made on her marriage with Kenneth Dixon, payable by my bond to the said trustees.' Her statement explains how that came to be put down under the head of 'Expenses and debts' instead of taking its place among the bequests to which I have already called attention.

"Now, on the other side is the heading, 'Kingswood, F., £300 a year.' That corroborates Miss Sugden's statement that the will contained this provision: 'That if my personal estate should be insufficient for the payment in full of the pecuniary legacies bequeathed by me, and to discharge my testamentary and other expenses, until they shall have been fully paid, my son Frank shall receive £300 a year out of the Kingswood estate, the rest of the income to be applied to make up the deficiency.' There does not only appear, in document J., 'F., £300 a year,' but there also appears 'Legs.' (legacies, that is), as being amongst the charges upon Kingswood, in addition to the charge which is designated by the letters 'Rt. M., Q. A. B.' (which, translated, means 'Robert Mann, Queen Anne's Bounty'), which is a confirmation of Miss Sugden's statement that this passage was contained in the will: 'I further charge my estate at Kingswood with the annual payment due from my son-in-law, the Reverend Robert Mann, to Queen Anne's Bounty for the building of the vicarage of Long Walton, in Leicestershire.' There then is to be found this: 'Estate, £150 per annum; three girls.' I have looked at the original document, and I must say it appears to me that there was

a word before the word 'estate'—the word 'other.' That has not been spoken to by any witness, and therefore it is a matter upon which I have exercised my own judgment. It seems to me to be the word 'other,' and that it has been struck out at some time. If it did stand, as I think it did, 'other estates,' it would be consistent with what Miss Sugden says was the disposition in the will under this clause: 'I give to the trustees of my said will three annuities of £50 each upon trust as to every of the same for the use of my said granddaughter, and I hereby charge the same on my Childerley Hall and other estates firstly hereinbefore devised.' Now, we know that this was put down by Miss Sugden without consulting this document, and without having refreshed her memory. That word, if I am right in supposing it to have been 'other,' occurring there, would be a corroboration of her statement as to the estate upon which those annuities were charged. In the corner of that document is a note showing that the late lord had made an estimate of what his personalty would be, as to which many observations have been addressed to me. The time when this was added to document 'J' has been stated by Miss Sugden to have been later than the drawing of the will, and it appears to me there is internal evidence of its being so, or at all events that there has been some addition made since. I find, 'Edward, £720.' I think it has become clear that that legacy was not given, as Miss Sugden supposed, by the will itself, but that it was given, as we now see, by one of the codicils; and I think it is equally clear that it was £700 and not £750. With regard to the £20, I think that is probably not an error, as has been supposed, on the part of Lord St. Leonards, but that it was a computation by him of the proportionate payment of the allowance to the present Lord St. Leonards which he was in the habit of making, and reference to which is contained in the codicil as a thing to be provided for in the event of his death. I may say, in passing, so that I may not have to return to it, that I have not left unnoticed the argument

against the value of this instrument which has been based upon some omissions from it. It has been observed that it does not contain the annuity to the aged person as to which Miss Sugden has spoken. That is true; but it is to be observed that it was not charged upon any particular estate, and therefore, in the order of ideas which appears to have been present to Lord St. Leonards when he made these memoranda, it would not have its appropriate place, because it is an enumeration of charges upon Kingswood, and, as I read it, 'other estates.' Neither could it take its place amongst the other legacies, because, as it was an annuity, its exact amount could not be computed; and further, the lady being of great age, it was probably not treated as a matter of very great importance. But, undoubtedly, no reason has been suggested for the omission of the legacy to the Misses Jemmett; that does not appear to have been put down by Lord St. Leonards upon this paper; but it may have occurred to his mind that what he had done for one set of grandchildren he would do for others, and he may have added it to the will without adding it to the memorandum."[1]

Sec. 81. **Letters of testator and others — Alleged copy.** In the case already so extensively quoted from, letters of the testator, written before his decease, were admitted in evidence; they were about what he intended to put in his will. When it was first discovered that the will was lost, at the suggestion of her solicitor, Miss Sugden sat down and wrote out verbatim her father's will as she recollected it. This she did without consulting any one, or refreshing her memory, not even by an examination of the memoranda, with others, that we have referred to. All the statement was put in evidence. It was admissible as a copy of the will; but seems to have been used to corroborate her oral testimony as to the contents of the will.[2]

[1] Sugden v. Lord St. Leonards, 45 L. J. (P. & D.) 49; 17 Moak, L. R. 1 P. D. 154 (1876); S. C. 34 L. T. (N. S.) 372; 24 W. R. 479; 453.

[2] Johnson v. Lyford, L. R. 1 P.

Sec. 82. **Admissions.**— The statements of the heir claiming in opposition to the will, as to its contents, are admissible.[1] So the declarations of the opposite party who is claiming title to the property alleged to be devised are admissible,[2] especially if in disparagement of title.[3]

Sec. 83. **Probability of disposition of property.**— The relationship of the testator to the alleged devisees or legatees, their ages and circumstances, his affections, evidenced by expressions and acts, for them, may be given in evidence, as tending to show the probability of the disposition he made of his property, if that probability corresponds with the alleged contents of the will.[4] So, no doubt, his dislike of a legatee might be shown, to contradict his claim that the will was in his favor, as alleged. Indeed, in Sugden's Case, evidence of a change of affection for a legatee under a former will was shown to account for an alleged difference between it and the lost will, such legatee's share by the latter having been greatly reduced. So in this case the contents of the former will is constantly referred to in corroboration of the witness as to the contents of the latter, she having stated wherein they differed.

Sec. 84. **Refreshing memory.**— A witness may refresh his memory from a copy he knows to be a true one, but not from one he does not so know.[5] But after two witnesses had testified to the contents of the will, a copy attached to the petition was shown them, which they said was substantially correct. This copy was then put in evidence, and this was held not erroneous.[6] Where the will was in the opposite party's hands, and on notice to produce it he

& D. 546 (1868), letters of the testator; Conoly v. Gayle, 61 Ala. 116 (1878).

[1] Brown v. Morrow, 43 Q. B. (Canada) 436 (1878). But see Matter of Ruser, 6 Dem. 31.

[2] Hayball v. Shepherd, 25 Q. B. (Can.) 536 (1866).

[3] Nelson v. Whitfield, 82 N. C. 46 (1880). In this case the heir was denying the existence of the will.

[4] Wyckoff v. Wyckoff, 1 C. E. Green, 401 (1863).

[5] Jaques v. Horton, 76 Ala. 238 (1884).

[6] Apperson v. Cottrell, 3 Port. (Ala.) 51 (1836); S. C. 29 Am. Dec. 239.

failed to do so, a copy duly proved was admitted, and this was held not error.[1]

Sec. 85. **Declarations of testator.**— The memoranda of the testator admitted in Sugden's Case [2] were in effect declarations of Lord Sugden as to his intentions concerning the proposed contents of his will. But in that case his oral declarations made before he executed his will as to his intentions of disposing of his property by will, those made at its execution, and lastly those made after its execution as evidence of what he had done,— all these were admitted to prove the contents of the lost will. It will thus be perceived that there are three kinds of declarations: before, at the time of, and after the execution of the will. There is no dispute that his declarations at the time of the execution of his will are admissible; all the authorities agree on this point. Even a letter written by him on the evening of the day of the execution of his will was admitted on this ground alone.[3] In discussing this question generally, of all declarations, Lord Cockburn said:

"The question is whether the declarations of the testator can be received as secondary evidence of the contents of the lost will. No doubt, generally speaking, where secondary evidence is admissible, if oral, it must be given on oath; if documentary, it must be verified on oath. Nevertheless, the declarations of deceased persons are in several instances admitted as exceptions to the general rule, where such persons have had peculiar means of knowledge, and may be supposed to have been without motive to speak otherwise than according to the truth. It is obvious that a man who has made his will stands pre-eminently in that position. He must be taken to know the contents of the instrument he has executed. If he speaks of its provisions, he can have no motive for misrepresenting them, except in the rare instances in which a testator may have the inten-

[1] Hamilton v. Lightbody, 21 C. P. (Cai.) 126 (1870). See Hayball v. Shepherd, 25 Q. B. (Can.) 536 (1866).

[2] Secs. 79 and 80.

[3] Johnson v. Lyford, L. R. 1 P. & D. 546 (1868).

tion of misleading by his statements respecting his will. Generally speaking, statements of this kind are honestly made, and this class of evidence must be put on the same footing with the declarations of members of a family in matters of pedigree; evidence not always to be relied on, yet sufficiently so to make it worth admitting, leaving its effect to be judged of by those who have to decide the case.

"It is upon this principle, I presume, that the declarations of a deceased testator have in more than one instance been admitted in evidence. Thus they have been admitted, as in Doe v. Palmer,[1] to negative the presumption arising from interlineations appearing on the face of a will that such interlineations have been made subsequently to the execution of the will. In like manner the declarations of a testator have been admitted to show the continuing existence of the will at the time they were made, and so to rebut the presumption of the will having been destroyed *animo revocandi*, when the will, having remained in the custody of the testator, is no longer forthcoming. Thus if a testator were to say, 'When I am dead you will find my will in such a place;' or, 'I have left my estate of Blackacre to my son John;' or, 'I have left £5,000 to my daughter Mary,' such or similar declarations would be receivable in evidence to show that the will was, so far as was known to the testator, in existence at the time they were made.

"The question before us is whether the statements made by a testator as to the provisions of his will can be received as evidence of the contents of a will known to have existed, but which at his death is no longer forthcoming. That, morally, such statements and declarations are entitled, where no doubt exists of their sincerity, to the greatest weight, cannot be denied; and I am at a loss to see why, when such evidence is held to be admissible for the two purposes just referred to, it should not be equally receivable as proving the contents of the will. If the exception to the

[1] 16 Q. B. 747; S. C. 20 L. J. (Q. B.) 367.

general rule of law which excludes hearsay evidence is admitted, on account of the exceptional position of a testator, for one purpose, why should it not be for another, where there is an equal degree of knowledge, and an equal absence of motive to speak untruly? Can it be contended that, if the testator had given written instructions for his will, or had first made a draft of the will and had indorsed on the back of it, 'This is the draft from which I copied my will,' the draft would not have been admissible to prove the contents of the will? Or suppose he had made a copy of the will, indorsing it as such, is our law this — that the copy would be inadmissible to show the contents of the will if it was lost?

"All the observations made by Lord Campbell in Doe v. Palmer as to the mischief which would result from excluding such testimony apply equally here. 'If the draft of the will could be produced,' says Lord Campbell, 'corresponding with the will in its altered form, would it not be admissible evidence? and might not the jury infer from it that before the will was executed the draft and the will had been compared and the mistake rectified? Would not written or verbal instructions from the testator to his solicitor to draw the will in the altered form be equally admissible? In what respect do such verbal instructions differ for this purpose from a contemporaneous declaration by the testator to another person that he had determined in his will to dispose of his property in the manner carried into effect by the will as altered? What distinction can be drawn between the draft of the will, or the written instructions for the will, and the verbal declarations of the testator's intention, except as to the strength of the evidence which they respectively afford? As to admissibility they all seem to rest on the same principle; and if the verbal declaration of intention must be rejected, so must the draft of the will with the initials of the testator affixed to it. It would not be very creditable to the law if such evidence were to be excluded; and I am not aware,' he adds,

'of any principle, rule of law, decided case or dictum against the admissibility of such evidence.' These observations, in which I entirely concur, appear to me equally applicable to the present case. I entertain no doubt that prior instructions, or a draft authenticated by the testator, or verbal declarations of what he was about to do, though of course not conclusive evidence, are yet legally admissible as secondary evidence of the contents of a lost will. There are, no doubt, cases in which the declarations of a testator are inadmissible. Thus, a statement by a testator that he had duly executed his will[1] could not be received as evidence of its due execution, as was decided in The Goods of Ripley;[2] and there is good reason for the decision, namely, that the exercise of the testamentary power being conditional on the observance of the formalities prescribed by statute, a man cannot, by his own mere assertion, establish that he has fulfilled the conditions necessary to the exercise of the right. So where there is a patent ambiguity on the face of a will arising from an error either in the designation of the person who is to take, or of the property bequeathed, which makes the carrying of the will into effect impossible, the instructions or other declarations of the testator cannot be resorted to to remove the difficulty. For here again the statute comes in the way, and prevents effect being given to the will otherwise than as executed by the testator. So that if, as in Doe v. Hiscock,[3] he has spoken of John as the eldest son of his son John, when in fact the eldest son of John was Simon, and John was the second son, effect cannot be given to the will by showing that the testator meant Simon when he said John. That would be to make a new will unaccompanied by the statutory requirements. It is obvious that the present case stands on totally different grounds. Like that of Doe v. Palmer,[4] it has no reference to an ambiguity to be solved.

[1] See sec. 46.
[2] 1 Sw. & Tr. 68.
[3] 5 M. & W. 363.
[4] 16 Q. B. 747; S. C. 20 L. J. (Q. B.) 367.

No difficulty here arises as to making the will different from its language as executed by the testator. There being no question as to the due execution the statute creates no difficulty. The question is simply one of the admissibility of secondary evidence, and has to be determined by the rules of evidence alone. I am therefore decidedly of opinion that all statements or declarations, written or oral, made by a testator prior to the execution of his will, are admissible as evidence of its contents; and this, of course, lets in, in this case, the papers 'J'[1] and 'K,' memoranda made by the testator as preparation for his will."

Sec. 86. **Same, continued.**— It will aid us here to give the opinion of the Master of the Rolls (Jessel) on this point. In discussing the question he said: "In this particular instance there is the evidence of a person who had seen the will; and the real point to be considered and decided is whether that evidence can be confirmed or corroborated by declarations of the testator, made either to that witness or to other persons, and if so, whether those declarations, to be admissible in evidence, must be limited to declarations made at or before the execution of the will, or may be extended to declarations made after the execution of the will.

"Now, it might well have been that our law, like the law of some other countries, should have admitted as evidence the declarations of persons who are dead in all cases where they were made under circumstances in which such evidence ought properly to have been admitted; that is, where the person who made them had no interest to the contrary, and where they were made before the commencement of the litigation. That is not, however, our law. As a rule the declarations, whether in writing or oral, made by deceased persons, are not admissible in evidence at all. But so inconvenient was the law upon this subject, so frequently has it shut out the only obtainable evidence, so frequently would it have caused a most crying or intolerable injustice,

[1] Secs. 79, 80.

that a large number of exceptions have been made to the general rule.

"I will consider first what the exceptions are, and what is the principle which guides the courts in making exceptions. The exceptions are generally considered to be three principal and three subordinate exceptions. It does not matter in what order I take them. First, there is an exception of a declaration accompanying an act; secondly, of a declaration against interest; and thirdly, of a declaration made by a person in the course of business — one which it was his duty to make. These are three large exceptions.

"There are then some smaller exceptions; the first is the proof of matters of public and general interest — one might say of *quasi*-historical interest — not actually historical, where we admit the declarations of persons who may from their position be fairly presumed to have had knowledge on the subject.

"In the next place we admit evidence which is in its nature very weak indeed, that is, in matters of pedigree, where we admit declarations of deceased members of a family on its being shown that the persons were members of the family.

"Now, I take it, the principle which underlies all these exceptions is the same. In the first place the case must be one in which it is difficult to obtain other evidence, for no doubt the ground for admitting the exceptions was the very difficulty. In the next place the declarant must be disinterested; that is, disinterested in the sense that the declaration was not made in favor of his interest. And thirdly, the declaration must be made before dispute or litigation, so that it was made without bias on account of the existence of a dispute or litigation which the declaration might be supposed to favor. Lastly — and this appears to me one of the strongest reasons for admitting it — the declarant must have had peculiar means of knowledge not possessed in ordinary cases.

"Now, all these reasons exist in testifying both as to mat-

ters of public and general interest and as to matters of pedigree; and some, if not all, of them exist in the other cases to which I have referred. They all exist in the case of a testator declaring the contents of his will. Of course, as in the case of pedigree, the courts must be cautious in admitting such evidence. From its very nature it is evidence not open to the test of cross-examination. It is very often produced at second or third hand, and it is therefore particularly liable to lose something of its color in the course of transmission. It is so easily and so frequently fabricated that all courts which have to dispose of such cases must be especially on their guard.

"But that goes only to the question of the weight to be attributed to the evidence when admitted, it does not go to the question of admitting the evidence itself; and I must say it appears to me that, having regard to the reasons and principles which have induced the tribunals of this country to admit exceptions in the other cases to which I have referred, we should be equally justified and equally bound to admit it in this case. When I say equally, perhaps I state the case a little too low, because if there is any case in the world in which it is incumbent upon a tribunal not to grant a premium for fraud or wrong, not to hold out to the world that any man who is able to get hold of the will of a testator which may disappoint him of his expectations, just or unjust, if he once destroys it shall be able to acquire the property either for himself or for those whom he wishes to benefit,— I say if ever there was such a case it is the case of a lost will. The court should be anxious, not narrowly to restrict the rules of evidence, which were made for the purpose of furthering truth and justice, but, guided by those great principles which have guided other tribunals in other countries in admitting this kind of evidence generally, to admit it at all events in the special case which we have under consideration."

Sec. 87. **Anterior declarations.**— "I therefore entirely concur in the Lord Chief Justice's conclusion that this evi-

dence is admissible, not only as regards that portion of it which is anterior to the execution of the will, but also as regards that portion of it which is posterior to its execution. As regards the portion of it anterior to the execution, it has been admitted, where it has been admitted at all, on a somewhat different ground. It is not strictly evidence of the contents of the instrument, it is simply evidence of the intention of the person who afterwards executes the instrument. It is simply evidence of probability — no doubt of a high degree of probability in some cases and a low degree of probability in others. The cogency of the evidence depends very much on the nearness in point of time of the declaration of intention to the period of the execution of the instrument. Now, in this case we have that link supplied in the most satisfactory manner as regards the two important documents 'J' and 'K.' We have the evidence of the witness that they were, to use her words, jotted down at the time when the will was being written, and therefore immediately before the execution; and in that case it is not to be presumed for a moment that there was any change in the intention of the testator from the time of jotting down his legacies to the time when he signed the will. As regards the earlier document, no doubt that relates to a prior will — the will of 1867; but we have the evidence of Miss Sugden that that will was incorporated with the second will, and therefore to that extent it brings the evidence down to the time of the execution of the second will.

"We must also remember that those documents were carefully preserved by the testator; that they were tied up with other documents in the same box which contained his will and codicils, and that it was not likely he would so carefully have preserved them if he had changed his intention between making them and signing his will. If they had no longer represented his final intention he would probably have destroyed them or thrown them away as waste paper. That confirms to my mind the value of the

documents, that although only evidence of intention, yet they are evidence of intention not changed at the time of the execution. Upon these documents, I think, whatever view may be taken as regards the latter one, full reliance ought to be placed." [1]

Sec. 88. **Posterior declarations.**—Lord Cockburn, in passing upon the admissibility of those declarations of the testator made after the execution of the will, said, in Sugden's Case: "The admissibility of declarations made subsequently to the execution of the will create difficulty by reason of a dictum of Lord Campbell in Doe v. Palmer,[2] and in a decision of Lord Penzance in Quick v. Quick.[3] In principle there appears to me to be no distinction. The position of the testator is the same, as respects both peculiar knowledge and motive for speaking the truth, which can be no less than the motive which he has when making statements as to his intentions prior to the execution of the will. In the case of a holograph will the testator alone may know the contents. In the case of its loss his statements afford, morally, the best evidence of the contents; yet we are asked to exclude their operation as showing the contents, though it is acknowledged that such evidence is available to rebut the presumption of revocation and to establish what is called adherence to the will. The adoption of such a rule would, moreover, lead to a very strange anomaly. The great majority of statements made by a testator, adduced for the purpose of proving adherence, are in fact statements as to the contents of the will. But such statements of the contents of the will, assumed to be truthful, having been admitted and acted upon for the purpose of showing that, as far as the testator was concerned, the will was still alive, how is it possible to shut out that evidence when the contents come directly in question? It

[1] Sugden v. Lord St. Leonards, 1 L. R. P. D. 154 (1876); S. C. 34 L. T. (N. S.) 372; 24 W. R. 479; 45 L. J. (P. & D.) 49; 17 Moak, 453.

[2] 16 Q. B. 747; S. C. 20 L. J. (Q. B.) 367.

[3] 3 Sw. & Tr. 442; S. C. 33 L. J. (P. M. & A.) 146.

appears to me that if, as an exception to the general rule, the evidence is admissible for the one purpose, it must be equally so for the other. How can we use evidence of the contents of a will for an ulterior purpose, and shut out the same evidence when the contents of the will are themselves immediately in question?

"As regards the two authorities referred to, it is to be observed that what was said by Lord Campbell in Doe v. Palmer is merely an *obiter dictum*, unnecessary to the decision of the case, inasmuch as all the declarations of the testator given in evidence there had been made prior to the execution of the will. Lord Campbell says: 'Declarations of the testator after the time when a controverted will is supposed to have been executed would not be admissible to prove that it had been duly signed and attested as the law requires'—a proposition in which, for the reasons I have already given, I fully concur. He then goes on to say: 'And, for the same reason, a declaration by the testator, after the will was executed, that the alteration had been made previously, would be inadmissible.' This may be more doubtful. But assuming it to be right, it does not touch the present case. The question in Doe v. Palmer turned on the efficacy or inefficacy of the execution, which, if made after the interlineations, would be valid, but if made before they were inserted would be inoperative to cover them. What it comes to is that the declarations of a testator cannot be used to prove that the execution of the will was such as to give effect to it. The dictum of Lord Campbell does not really, any more than the decision in the case, affect the question of the admissibility of the declarations of a testator as to the contents of his will where the execution is not in question.

"The case of Quick v. Quick is, however, an authority directly in point, as the contents of the will were sought to be proved by declarations of the testator made after its execution. Refusing to act on these declarations, Lord Penzance refused probate of the will. Taking a different

view of the law, for the reasons I have given, I cannot concur in the judgment of Lord Penzance in the case of Quick v. Quick, and I feel that we are bound to overrule it. I am therefore of opinion that the various statements of Lord St. Leonards, whether before or after the execution of his will, are admissible to prove its contents."

Sec. 89. **Same, continued — Declarations of third persons.**— In this country there are many cases to the same effect, and that such is the rule as laid down in these quotations has scarcely been doubted.[1] Even the declarations of a third person in the testator's presence as to the contents of his (the testator's) will have been admitted, the testator not contradicting them.[2]

Sec. 90. **Dissenting view on declarations.**— Notwithstanding the almost universal decisions of the courts that both posterior and anterior declarations of the testator are admissible to prove the contents of his will, there has been a dissent from that view. Even the decision of the judges in Sugden's Case has been doubted in the house of lords, and the reasoning therein questioned, but by a dictum only.[3] In this case in the house of lords the judges manifested a disposition to adopt the dissenting opinion delivered by Mellish, L. J., in Sugden's Case; and that opinion therefore becomes of more importance than it would otherwise have been. Lord Mellish was satisfied with the result obtained in Sugden's Case,— that the contents of the will was fully established, but by evidence outside of the testator's declarations. In reviewing the decision of the court below, he comes to the conclusion that the trial judge did not rely upon the declarations at all; and for this reason, being satisfied with his conclusions on the remaining evidence, he

[1] McBeth v. McBeth, 11 Ala. 596 (1847); Morris v. Swaney, 7 Heisk. 591 (1872); Conoly v. Gayle, 61 Ala. 116 (1878); Page v. Maxwell, 118 Ill. 579 (1886); S. C. 8 N. E. Rep. 852; Foster's Will, 13 Phila. 567 (1877); S. C. 34 Leg. Int. 222; Mercer v. Mackin, 14 Bush, 434 (1879); S. C. 1 Am. Prob. Cas. 399; Jackson v. Vail, 7 Wend. 125 (1831) (a deed).

[2] Morris v. Swaney, *supra*.

[3] Woodward v. Goulstone, L. R. 11 App. Cas. 469 (1886).

was for affirming the case, and insisted that no question of the admission of declarations was involved. But after making all these statements, he went on to say that "I am not myself prepared to say that the decision in Quick v. Quick[1] is bad law. If I was asked what I think it would be desirable should be evidence, I have not the least hesitation in saying that I think it would be a highly desirable improvement in the law if the rule was that all statements made by persons who are dead respecting matters of which they had a personal knowledge, and made *ante litem motam*, should be admissible. There is no doubt that by rejecting such evidence we do reject a most valuable source of evidence. But the difficulty I feel is this: that I cannot satisfactorily to my own mind find any distinction between the statement of a testator as to the contents of his will and any other statement of a deceased person as to any fact peculiarly within his knowledge, which, beyond all question, as the law now stands, we are not, as a general rule, entitled to receive.

"The Master of the Rolls has referred to the exceptions which have been made to the rule, but none of them appear to me to be applicable to this case. I think there is a most material distinction, as was pointed out by Lord Campbell in Doe v. Palmer,[2] between declarations made before a will is executed and declarations made subsequently. The declarations which are made before the will are not, I apprehend, to be taken as evidence of the contents of the will which is subsequently made; they obviously do not prove it; and wherever it is material to prove the state of a person's mind or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions were. When a doubt is thrown on the correctness of evidence which has been given as to the contents of a will, the declarations of the testator as to what he intended

[1] 3 Sw. & Tr. 442; S. C. 33 L. J. (P. M. & A.) 146.

[2] 16 Q B. 747; S. C. 20 L. J. (Q. B.) 367.

to put in his will, made either contemporaneously with or prior to the execution of his will, are obviously evidence which may corroborate the other testimony as to what is contained in the will. But, to my mind, they do not of themselves prove what were the contents of the will — they only corroborate the other evidence which has been given of the contents; because it is more probable that the testator has than that he has not made a particular devise, or a particular bequest, when he has told a person previously that he intended to make it, inasmuch as it shows that he had it in his mind to make such a will at the time he made that declaration. But a declaration, after he has made his will, of what the contents of the will are, is not a statement of anything which is passing in his mind at the time — it is simply a statement of fact within his knowledge; and therefore you cannot admit it unless you can bring it within some of the exceptions to the general rule that hearsay evidence is not admissible to prove a fact which is stated in the declaration. It does not come within any of the rules which have been hitherto established, and I doubt whether it is an advisable thing to establish new exceptions in a case which has never happened before, and may never happen again; for you then establish an exception which more or less throws a doubt on the case. It appears to me that it would be better to leave it to the legislature to make the improvement which, in my opinion, ought to be made in our present rules with regard to the admissibility of evidence of that description. In all other respects I entirely agree with the judgments which have been given."

In this connection we may cite a Kentucky ejectment case, where it was held that the declaration of the testator that he had made a will was not admissible against the heirs at law "because of the privity between him and them;" and it was said: "Declarations by Mercer that he had made a will were not in any sense against his interests, and consequently they do not fall within the reason of the rule under which this class of hearsay is admitted in evi-

dence. That regard which men generally have for their interests is the principal foundation upon which the rule admitting declarations against interest is based. Experience has taught us that when one makes a declaration in disparagement of his own rights or interests it is generally true; and because it is so the law has deemed it safe to admit evidence of such declarations against him and those claiming through or under him. But the rule is limited to declarations prejudicial to his pecuniary or proprietary interests. Declarations that the decedent made the will not only want that guaranty for their truth on which the ruling admitting evidence of declarations is based, but of all kinds of declarations relating to important subjects, none are more unreliable than declarations concerning wills."[1]

[1] Mercer v. Mackin, 14 Bush, 434 (1879); S. C. 1 Am. Prob. Cas. 399.

CHAPTER VIII.

SUFFICIENCY OF EVIDENCE.

SEC. 91. **Danger of establishing lost will.**— Caution should be observed in establishing a lost or destroyed will, especially one that is lost. A Canadian court has well spoken on this subject. "It is of terrible consequence to establish the existence or contents of an absent will upon doubtful testimony. It is far less appalling to one's sense of justice and right to believe that a will, proved to have once existed and to have contained a full disposition by the deceased of his property, continued to represent his intentions and wishes at his death, when its actual destruction has not been proved, though it be absent from having been destroyed by accident or from being mislaid or withheld by some one intrusted with it. In such a case one has to balance the probabilities upon the evidence of opposing facts and presumptions, when the evidence does not lead with certainty to the one conclusion or the other." [1]

SEC. 92. **Degree of proof required — Burden.**— The statutes providing for the establishment of lost wills are to be liberally construed. Of one of them it was said: "This is a remedial statute and must be liberally construed." [2] But this does not apply to the *quantum* or degree of proof necessary to establish or prove the contents of the will. In establishing or probating the will the burden is of course on the propounder.[3] But the cases are not at one entirely on the degree with which the contents must be proved by oral evidence. Various expressions are used by the courts

[1] Bessey v. Bostwick, 13 Gr. Ch. 279 (1867).

[2] Hall v. Gilbert, 31 Wis. 692 (1873).

[3] Southworth v. Adams, 11 Biss. 256 (1882); Newell v. Homer, 120 Mass. 277 (1876).

indicating the degree which they regard as necessary; such as "full and satisfactory;"[1] "by strong, positive and convincing evidence;"[2] "clear, full and satisfactory;"[3] by "strict proof;"[4] "such as to satisfy the conscience of the jury; it should be very clear and strong."[5] But there are other courts which seem to go beyond these quotations. Thus it was said that it must be proved "by the clearest, the most conclusive and satisfactory proof;"[6] "by the clearest and most stringent evidence;" if "depending on the recollection of witnesses, the evidence must be strong, positive and free from all doubt;"[7] "upon the clearest and most stringent evidence;"[8] "evidence ought to be of extreme cogency, and such as to satisfy one beyond all reasonable doubt that there is really before one substantially the testamentary intentions of the testator;"[9] "by the clearest, most conclusive and satisfactory proof;"[10] "by evidence strong, positive and free from doubt."[11] But it is evident that many of these later cases cited are erroneous in the expressions used in them; for how can it be said that the proponent must establish the contents of the lost will, when he is compelled to resort to oral evidence, "free from doubt;" or "free from all doubt;" or "to satisfy the mind beyond all reasonable doubt?" These quotations go beyond the rule required in criminal cases, unless it is the last one. Thus in a case where the jury were charged that they could not find the contents of the will unless the evidence "is clear and positive, not vague or uncertain recol-

[1] Dudley v. Wardner, 41 Vt. 59 (1868).

[2] Southworth v. Adams, *supra*.

[3] Morris v. Swaney, 7 Heisk. 591 (1872).

[4] Apperson v. Dowdy, 82 Va. 776 (1887); S. C. 1 S. E. Rep. 105.

[5] Kitchen v. Kitchen, 39 Geo. 168 (1869); S. C. 99 Am. Dec. 453.

[6] Hale v. Monroe, 28 Md. 98, 113 (867).

[7] Davis v. Sigourney, 8 Met. 487 (1844); Johnson's Will, 40 Conn. 587 (1874).

[8] Buchanan v. Matlock, 8 Humph. 390 (1874); S. C. 47 Am. Dec. 622.

[9] Woodward v. Goulstone, L. R. 11 App. Cas. 469 (1886); S. C. 56 L. J. (P.) 1; 56 L. T. 799; 35 W. R. 337; 51 J. P. 307.

[10] Vining v. Hall, 40 Miss. 83 (1866).

[11] Newell v. Homer, 120 Mass. 277 (1876).

lections, and of such a character as to leave no reasonable doubt as to any one of the substantial parts of the paper," the charge was held erroneous because it required proof beyond a reasonable doubt.[1]

Sec. 93. **Same amount of evidence as in a contract—Ejectment.**— Proof of a will, so far as the *quantum* or degree of the evidence is concerned, does not differ from the case of a lost or destroyed deed. Thus it was said: "The court ought not, I think, to act on less proof than the court of chancery has always required when asked to rectify mistakes in written contracts, and then replace written evidence by parol." "The parol evidence that should be permitted to stand in place of a written will ought to be of a very cogent character."[2] In Alabama about the same view was taken as is expressed in the above quotation. Thus, it was said: "We can conceive of no valid reason why there should be any difference in the *quantum* of proof necessary to establish the contents of a lost will and the contents of a lost deed or other written instrument. In either case the proof must be satisfactory; and probably more caution should be observed in the case of a lost will, as the testator cannot be heard in respect to the disposition he has made of his estate, and as a will is required to be attested by two witnesses."[3]

Sec. 94. **Destroyed by interested person.**— If the will has been destroyed by an interested person, and he is the one to be affected by its establishment or probate, less evidence is required to establish its contents, just as we have seen less is required in such a case to prove its contents.[4] Thus, it was said: "Even where the exact contents of a will cannot be ascertained, if it has been suppressed by a

[1] Skeggs v. Horton, 82 Ala. 352 (1887); S. C. 2 So. Rep. 110.

[2] Wharram v. Wharram, 3 Sw. & Tr. 301 (1864); S. C. 10 L. T. 163; 33 L. J. (P. M. & A.) 75; 10 Jur. (N. S.) 499; 12 W. R. 889.

[3] Jaques v. Horton, 76 Ala. 238 (1884). Proving contents of a will said to rest on same ground as proving contents of a deed. Clark v. Wright, 3 Pick. 67 (1825); Davis v. Sigourney, 8 Met. 487 (1844).

[4] Sec. 64*a*.

person interested in opposition thereto, the court or jury, *in odium spoliatoris*, will be authorized to presume many things against the party who has been guilty of the fraudulent act."[1] If, in such a case, it is sought to establish the will as against the spoliator, the evidence need not be as cogent as is required in the case of a mere loss.[2] Where the heir said, after the testator's death, that he had his will, but, failing to produce it, explained such failure by saying he meant that he had his directions as to the disposal of his affairs, stating what they were, this was held absurd, and the will established upon what he said those directions were.[3] Where the will was destroyed by the connivance of a part of the heirs, in a suit by an heir not one of them, it was held that, after having shown its execution, he was only required to show in general terms the disposition which the testator had made of his property by the instrument destroyed, and that it purported to be his will.[4] So a rough draft and the testimony of a single witness to its contents were held sufficient, under circumstances, to warrant the belief that if it had been in existence its contents would have affected the heir's right to inherit.[5] But if it be charged that the will was spoliated or fraudulently destroyed after the testator's death that fact must be clearly proved by "the most stringent evidence," and the propounder must "be prepared to support his case by clear and indisputable evidence."[6] Yet this quotation relates chiefly to the fact of destruction; and if that fact is proved as clearly as this quotation requires it to be done, then many presumptions are raised in favor of the propounder, as has

[1] Betts v. Jackson, 6 Wend. 173 (1830). Everything is presumed against him. Brookie v. Portwood, 84 Ky. 259 (1886).

[2] Mahood v. Mahood, 8 Ir. Eq. 359 (1874).

[3] Brown v. Brown, 10 Yerg. 84 (1836). In this case evidence of the testator's dislike of the heir was admitted.

[4] Anderson v. Irwin, 101 Ill. 411 (1882).

[5] Kearns v. Kearns, 4 Harr. (Del.) 83 (1843).

[6] Huble v. Clark, 1 Hagg. 115 (1827).

been elsewhere stated.[1] But it has been said that the contents "cannot be established as testamentary by proving a conspiracy to suppress papers, the contents of which cannot be shown;" and such evidence is not entitled to go to the jury unless the contents are first proved.[2] Yet the court cannot surmise what the will was.[3]

Sec. 95. **Destroyed by propounder.** — If the person seeking to prove the contents destroyed the will, he will not be permitted to do so, unless he did it by mistake, accident, or it occurred without his agency, and not then "until every inference of a fraudulent design is repelled;" but if a sufficient motive is assigned and clearly established by the evidence, "the court will not, upon mere conjecture, impute an inadequate and dishonest motive" — such as where he destroyed the will because he supposed the entire property devised was not the testator's, and therefore the will was of no value.[4] In the case cited the propounder destroyed the will believing the entire property devised was not the testator's, he claiming under a former will; but a decision of the court, rendered after its destruction, declared that it was, the title resting as a matter of construction upon such former will. Under these facts the court said the lost will could be established and probated.[5]

Sec. 96. **Ejectment.** — Where the contents of a lost will may be proved without first having it probated, it was said that the high degree of evidence required to probate it was not necessary in proving its contents in an action of ejectment.[6] In proving the contents of a deed, which does not differ from proving the contents of a will, the court said: "This evidence, taken together, was sufficient to enable the

[1] See secs. 64*a*, 94.

[2] Newell v. Homer, 120 Mass. 277 (1876).

[3] McNally v. Brown, 5 Redf. 372 (1882).

[4] Wyckoff v. Wyckoff, 1 C. E. Green, 401 (1863).

[5] To same effect is Moore v. Whitehouse, 3 Sw. & Tr. 567 (1864); S. C. 34 L. J. (P. & D.) 31; 11 L. T. 458.

[6] Nelson v. Whitfield, 83 N. C. 46 (1880).

court to approximate to the date of these deeds and to determine their character, the parties to them and the premises conveyed by them. This was all that was essential." [1]

Sec. 97. **Destroyed before death.** — It is said that greater care and better proof are required to establish a will destroyed before death than is required to establish one destroyed or lost thereafter; for in the former instance "the court would be much more likely to be imposed upon than when establishing a will which is shown to have existed after the decease of the testator." [2] But this statement only applies to the issue of revocation and its presumption, and not to proof of its contents.

Sec. 98. **Old will — Long possession of real estate.** — A lost will that is offered for probate a long time after the testator's death is looked upon with suspicion. In many states, statutes of limitation prevent the probate of a will after a certain time; but this is not so in all of them. Thus, where a will was offered for probate six or seven years after the testator's death by his widow, who was solely interested under it, proof of its contents resting largely on her evidence, the court refused to probate it.[3] So, where a possession under a claim of ownership was held for a long time, the court, taking other matters into consideration, refused to probate the will, saying that old titles should not in this way be disturbed.[4] There is no presumption that a will, by reason of its great age, was properly executed, nor any indulgence in favor of a proper execution.[5]

[1] Kent v. Harcourt, 33 Barb. 491 (1860). See Whiteley v. King, 17 C. B. (N. S.) 756 (1864).

[2] Sinclair's Will, 5 Ohio St. 290 (1855).

[3] Wharram v. Wharram, 3 Sw. & Tr. 301 (1864); S. C. 10 L. T. 163; 10 Jur. (N. S.) 499; 12 W. R. 889; 33 L. J. (P. M. & A.) 75.

[4] Apperson v. Dowdy, 82 Va. 776 (1887); S. C. 1 S. E. Rep. 105. See this case commented on elsewhere. Sec. 103. It is said that a will thirty years old proves itself, but this is where it is produced. Fetherly v. Waggoner, 11 Wend. 599 (1834).

[5] Rhodes v. Vinson, 28 Md. 98 (1867). But see Hall v. Gittings, 2 H. & J. 112 (1807).

SEC. 99. **Proof by copy.**— In the proof of lost or destroyed wills it is always a matter of regret that a copy of the will is not produced. Even a draft is better than parol evidence; but this is not an insuperable barrier. "It is unfortunate that the secondary evidence should to so large an extent be entirely of a parol character. It would have greatly strengthened the certainty with which I should deal with that secondary evidence if it had consisted of the draft of the instrument that is missing; but that, as was observed by Lord Campbell in Brown v. Brown,[1] only goes to the value of the evidence. It imposes upon one, however, the duty of exercising the utmost possible caution in dealing with evidence of this character. But if, notwithstanding the disadvantage I labor under, I arrive at a clear conclusion as to any of the contents of this will, it is my duty to find as a fact that such contents were a portion of the missing document."[2] The testator's attempted execution and his preservation of the copy were held such evidence that the original, which was complete and not provisional, was his will, that, with his declarations to that effect, the testimony of the copyist, who was a disinterested witness, were sufficient to authorize its establishment.[3] While somewhat out of place, it may be stated that if the executor offers a copy for probate, and a contest is raised as to the testator's capacity to make a will, he is estopped to deprive the court of jurisdiction of the matter by alleging that the original is not in court.[4]

SEC. 100. **Statutory copy.**— In some states a copy is allowed to take the place of one of the two witnesses to the contents required.[5] Where such was the case, and a copy was clearly proved, it was held not "necessary to prove the exact contents by any other witness," but that it was

[1] 8 E. & B. 876; S. C. 27 L. J. (Q. B.) 17.

[2] President Hannen in Sugden's Case.

[3] Wilbourn v. Shell, 59 Miss. 265 (1881).

[4] Wisener v. Maupin, 2 J. Baxt. 342 (1872).

[5] See sec. 77.

"sufficient if some other witness state in general terms the provisions of the instrument. In the present instance this was done."[1] In commenting upon a statute of this kind a court in New York said:

"While there is considerable conflict in the few cases involving declarations of deceased persons in proceedings of this character, yet I regard that as the better rule — the more consistent and reasonable — which favors their admission; but while these declarations are admissible, it is only as a circumstance to be taken in connection with other proof tending to establish a certain fact. It would be rendering the strict language of the statute nugatory to say that declarations of decedent, however lucid and precise they may be, however minutely they may detail the facts occurring at the execution of the will, and however numerous they may be, will establish the execution of the will, and also be tantamount to the 'two credible persons' made an indispensable necessity by the statute.

"Declarations of deceased persons are always a dangerous kind of testimony, and are received and scanned with closeness and scrutiny, and, in the usual run of cases tried in a surrogate's court, are not even admissible, except as bearing upon the testator's mental capacity; and it would be a marvelous stretch of the judicial functions to say that the reiteration of these statements can galvanize them into the 'two credible witnesses' provided for by the statute."[2]

Sec. 101. **Value of declarations of testator.**— We have already seen that the declarations of the testator are admissible to prove the contents of his will. The value of these declarations must depend upon the circumstances under which and the time and occasion where uttered. Thus, declarations of intention to devise his property in a certain way, made a long time before the execution of the will, have but little value; but the nearer they approach

[1] Forbing v Weber, 99 Ind. 592 (1884).

[2] Hatch v. Sigman, 1 Dem. 519 (1883).

that time the more value they have. So if such declarations are made repeatedly, beginning at quite an early period and extending down to near the time of the execution of the will, they are entitled to much more weight than if only made occasionally, and the more repetitions the greater weight they ought to have; for they tend to show a fixed and firm determination on the part of the testator to devise his property in a certain way, and, if they support the alleged contents of the will, must necessarily have their effect in convincing the mind that its alleged contents was the embodiment of his desire and designs. Those declarations made at the time of the execution of the will, especially his directions for drawing up his will and what he desired inserted in it, are entitled to more weight than his anterior, and perhaps his posterior, declarations; for they may be considered part of the *res gestæ* in the execution of the will. The testator is then in such a situation that it is almost impossible to suppose that he is misleading or telling a falsehood about the matter; it would be impossible for him to do so unless by collusion with or connivance of the scrivener. Posterior declarations must necessarily be of more weight than anterior ones; for then the testator is speaking of an existing fact and not an intention. Nor can the remoteness of the declaration from the date of the will be considered as materially tending to reduce their value, except so far as it is a question of memory, or some motive has intervened to induce him to tell a falsehood about its contents or purport. Whether or not declarations are sufficient to enable the court to establish the contents of a will is one of much doubt, and must vary with each particular case. They have been so considered.[1] Thus, where the name of the executor was written in the will and then erased, the declarations of the testator that a certain person was to be his executor, made before the execution of a codicil to the will, were admitted, and by

[1] McBeth v. McBeth, 11 Ala. 597 (1847). See Davis v. Davis, 2 Add. 223.

these alone the person appointed was ascertained, and upon their sufficiency he was appointed.[1]

Sec. 102. **Same, continued.**— In a case already cited, in speaking of the value of the testator's declarations, it was said: "It is certainly true that the declarations of the testator should be received with great caution, as such declarations are frequently made for the purpose of misleading and of stifling the importunity of relatives and friends. To entitle them to much weight there ought to be intrinsic evidence of their sincerity."[2] So in a Pennsylvania case, after stating that such declarations are admissible, it is said that they "are of little weight as against a will proven, or to establish the contents of a lost will, especially where, as is generally the case, the declarations are made to importuning or complaining relatives." "But these are to be distinguished, we think, from the acts and declarations of a testator tending to show and showing his conviction and understanding that he has a will in existence at the time of his decease."[3] In an English case it was said: "Few declarations deserve less credit than those of men as to what they have done by their wills. The wish to silence importunity, to elude questions from persons who take upon them to judge of their own claims, must be taken into consideration, with a fair regard to the *prima facie* import, and the possible intentions connected with all other circumstances." "After all the evidence, the loose declarations of the testator, under circumstances imposing on him no obligation of veracity, are nothing."[4] "His lordship [Thurlow] also made another observation of great weight, that, having raised the presumption from the fact, you beat it down by declarations which, from the very nature of mankind, deserve very little credit, viz.: 'What a man has done or will do by his will; how much shall stand and how

[1] Goods of Sykes, L. R. 3 P. & D. 26 (1873).

[2] McBeth v. McBeth, 11 Ala. 596 (1847).

[3] Foster's Will, 13 Phila. 567 (1877); S. C. 34 Leg. Int. 222.

[4] Pemberton v. Pemberton, 13 Ves. 301, 313 (1807).

much shall not.' Declarations are intended, generally, to mislead; but the *prima facie* presumption is established beyond all controversy," that the will was not revoked.[1] Dr. Wharton has said upon this subject: "Experience tells us that few kinds of talk are more unreliable than talk about wills. Not only are expressions of intention, when uttered (and ordinarily the very fact of their utterance is a presumption against them), uttered with the consciousness that they may be at any time recalled, but, as we have already noticed, it is a common maxim that people who talk about their wills very rarely make wills in conformity with their talk. What a man puts down in a solemn testamentary instrument is naturally very different from what he might say when disposed either to mystify those whom he might consider impertinent inquirers, or to please those whom, for the moment, he might particularly desire to please. . . . Nor are we to forget, in considering this question, the character of the medium through which these declarations must pass. The testator's lips are sealed in death, and evidence of his intentions, thus reproduced, comes to us without that sanction which is given when there is power of explanation in the person whose remarks are reported." [2]

Sec. 103. **Witnesses' opportunity to know contents — Recollection — Memory — Interest.**— In this connection very important questions are: What opportunity had the witnesses of knowing or ascertaining the contents of the will by seeing and reading it, or hearing it read by the testator or in his presence? So as to his recollection or memory. Does he recollect all or only a part of it? Can he give the exact language used or only its purport? All these are to be considered either by the jury or court, some even being regarded as matters of law. Courts cannot, in these mat-

[1] Ex parte Pye, 18 Ves. 148.

[2] Wharton's Ev. § 992. See quotation from Mercer v. Mackin, 14 Bush, 434 (1879); S. C. 1 Am. Prob. Cas. 399, at end of section 90. As somewhat weakening these strong suggestions Sugden's Case may be considered, in which his declarations seem to have much weight with the judges.

ters, act on probabilities.[1] A witness who has only heard the will read may testify to its contents although he does not know that it was read correctly.[2] Such evidence is not, however, of as high a grade as if he had read it himself, for he does not know whether he was deceived or not.[3] The occasion upon which it was read may have something to do with the weight of the witness' testimony. Thus, where the will was read at the funeral of the testator, in the presence of all the heirs, much significance was attached to this following of an old custom in considering whether it was correctly read.[4] Swinburn lays it down as a rule that the contents must be proven "by the clearest and most stringent evidence" of unexceptionable witnesses, "who saw and read the will and remember the contents thereof." And this view has been adopted by the Tennessee Supreme Court;[5] but this is not the rule in the other states, as the citation of cases shows. Where the testator tore the will into pieces, and then his son sewed them together, the will was admitted to probate.[6] The age of the witness necessarily has much weight. Thus, where a witness heard the will read in 1812, and in 1880, sixty-eight years afterwards, when she was eighty-five years old, undertook to give its contents from recollection, the will being somewhat intricate, the court refused to establish it because they doubted her recollection.[7] The training or education of the witness has much weight, as well as the length of the will or its simplicity. Thus in the Virginia case it was said that it was much easier to establish a simple than an intricate will. These remarks are well illustrated by the witness Miss Sugden in Lord

[1] Davis v. Sigourney, 8 Met. 487 (1844). Matter of Ruser, 6 Dem. 31.

[2] Morris v. Swaney, 7 Heisk. 591 1872); Everitt v. Everitt, 41 Barb. 385) (1864); Chisholm v. Ben, 7 B. Mon. 408 (1847); Nelson v. Whitfield, 82 N. C. 46 (1880).

[3] Apperson v. Dowdy, 82 Va. 776 (1887); S. C. 1 S. E. Rep. 105.

[4] Nelson v. Whitfield, *supra.*

[5] Hunter v. Gardenhire, 13 B. J. Lea, 658 (1884)).

[6] Foster v. Foster, 1 Addams, 462 (1823).

[7] Apperson v. Dowdy, 82 Va. 776 (1887); S. C. 1 S. E. Rep. 105. The will had been probated and the record destroyed.

Sugden's Case. She was an exceptional witness, and received merited commendations from the court for the fairness and knowledge she displayed. For years she had been her father's private secretary. He had taken special pains to instruct her in the intricacies of the law and make it plain to her. It was his delight to put the rules of law in plain and simple language, and much of his discourse was thus taken up. In speaking upon this subject in that case President Hannen said: "Undoubtedly if the evidence of the contents of a long and complicated will were given by a professional man who had himself drawn the instrument, or upon one or repeated occasions had had the opportunity of reading it, that would, under ordinary circumstances, be more satisfactory than the evidence of a non-professional person — above all, the evidence of a lady. But Miss Sugden's position is exceptional; of her integrity there can be no doubt; that has been stated with even greater force by those who represent the defendants than by the learned counsel who represents Miss Sugden herself. She was the daily companion for many years of one of the greatest lawyers that ever lived; who was devoted to his profession; who, to the last years of his life, delighted in carrying on his studies in that profession, and who took a pleasure in making plain to non-professional and other uninstructed minds subjects of a somewhat complicated character in which he himself took an interest. Miss Sugden was his assistant and amanuensis in the preparation of the later editions of his works, and she appears to have been always with him upon the many occasions on which he dealt with his testamentary papers and dispositions. She had, therefore, so to speak, a special training, which put her in a position of much greater advantage than a lady under ordinary circumstances might be expected to occupy. In addition to that she had ample opportunities of becoming acquainted with the contents of this instrument in particular."

In speaking of her interest the same judge said: "The integrity of Miss Sugden, I must remind those who hear

me, is not questioned; and the value of that admission must not be qualified away by saying that, though her integrity is undoubted, her recollection may be warped by interest where her statements are specific as to facts, and as to which there is no room for doubt if she be the witness of truth. No bias derived from interest can mislead her as to the number of times when she read or heard read the contents of this will; and she says specifically that Lord St. Leonards himself read the will to her on one occasion, that she read it herself at his request on three other occasions, and that on several occasions when he was dealing with his testamentary papers she had the will before her or in her hands, referring to it from time to time in the course of the assistance which she was giving to her father. She had, therefore, ample means of becoming acquainted with its contents."

Chief Justice Cockburn, in commenting upon her interest as witness, said: "It is nevertheless open to observation that Miss Sugden is a very interested person; that she takes very large benefits under the will. I am glad to think it has not occurred to any one to say or to suggest that upon that ground Miss Sugden has intentionally departed one hair's breadth from the truth. Nevertheless, a deep interest in the details of the will may lead a person, under the bias which interest so naturally produces, to fancy she recollects something in her own favor which she may not really recollect; therefore, although I am perfectly ready to give implicit credence to everything which Miss Sugden has stated as to the contents of this will, I shall be glad to find, for my own satisfaction and the satisfaction of every one else, corroboration of her statements in the collateral evidence."[1]

Sec. 104. **Corroboration — Interest.**— President Hannen, in speaking of Miss Sugden's interest and the necessity that she be corroborated in her statements, said: "In

[1] Sugden v. Lord St. Leonards, 1 372; 24 W. R. 479; 45 L. J. (P. & P. D. 154 (1876); S. C. 34 L. J. (N. S.) D.) 49; 17 Moak, 453.

considering what value I shall attach to Miss Sugden's statement of what was contained in her father's will, I have, as I have already stated, borne carefully in mind the fact that she is an interested party; that, above all other circumstances in the case, makes it my duty to see to what extent her statements are corroborated by independent testimony. Let me observe, however, with regard to this corroborative evidence, it is not necessary that I should find corroboration in every particular and to the full extent of what Miss Sugden has said before I give credit to her statements. Because that would be, in other words, to say that I ought not to use any evidence standing in need of corroboration unless there were proof enabling me to dispense altogether with the evidence to be corroborated. It is sufficient if I find that independent support is given to Miss Sugden's statements in so many instances that it raises in my mind the conviction that she is to be depended upon even in those matters which I do not find corroborated elsewhere. But it is my duty, and I have endeavored to discharge it, to seek step by step for the corroborative evidence in support of Miss Sugden's statement, in order that I might find what residuum there is for which I have to rely solely and exclusively upon what she says."[1]

SEC. 105. **Number of witnesses.**—Many of the old authorities lay it down that there must be two witnesses to the contents before it can be probated or established; in this they have copied Swinburn, who says there must be "two unexceptionable witnesses who saw and read the will and remembered the contents thereof;" and this statement of the rule has been adopted by a few courts in this country.[2] But the almost universal rule now is that one witness to the contents is sufficient.[3] This is true although by

[1] Sugden v. Lord St. Leonards, *supra.*

[2] Hunter v. Gardenhire, 13 B. J. Lea, 58 (1884); Toller on Executors, 71; 4 Burn's Eccl. L. 209. See Wyckoff v. Wyckoff, 1 C. E. Green, 401 (1863).

[3] Page v. Maxwell, 118 Ill. 579 (1886); S. C. 8 N. E. Rep. 852; Hildreth v. Schillinger, 2 Stock. Ch.

statute two attesting witnesses are required.[1] After stating that one witness is sufficient, the supreme court of Alabama said: "Such evidence, however, should be clear and positive — not vague or uncertain recollections — and of such character as to leave no reasonable doubt as to the substantial parts of the paper."[2] While in Connecticut this was admitted to be the rule, it was said: "This is no doubt true; but I apprehend that the court ought to be satisfied, not only that the character and standing of the witness are entirely above suspicion, but that he is capable of expressing with clearness and accuracy the precise meaning of the original will. Not only so, but the circumstances ought to be such as to afford no suspicion of the trustworthiness of his recollection, and he should be free from bias or interest. Indeed, whatever may be the number of witnesses, the proof of contents should be clear and satisfactory."[3] Where the universal or residuary legacy was established beyond question but the particular legacies were not, yet the propounder, who was the universal legatee, admitted in her petition the existence of such particular legacies, it was held that the existence of these latter having been established by the testimony of a single witness, this was sufficient, "because these legacies are alleged and set up in the petition of the party who is to be charged with them, and she cannot be permitted afterwards to deny what she has alleged in her pleadings."[4]

Sec. 106. **Statutory number.**— In several states two witnesses to the contents are required by statute, or one witness and a copy, usually; and it is sometimes added "by two credible witnesses."[5] In such a state it was said that

196 (1854); Dickey v. Malechi, 6 Mo. 177 (1839); S. C. 34 Am. Dec. 130; Graham v. O'Fallon, 4 Mo. 601 (1837).

[1] Skeggs v. Horton, 82 Ala. 352 (1887); S. C. 2 So. Rep. 110.

[2] Jaques v. Horton, 76 Ala. 238 (1884), quoting Dickey v. Malechi, *supra*.

[3] Johnson's Will, 40 Conn. 587 (1874).

[4] Gaines' Appeal, 11 La. 124 (1855); S. C. 4 Am. L. Reg. 364.

[5] Kidder's Estate, 67 Cal. 487 (1885); S. C. 6 Pac. Rep. 326.

the one who produces and merely verifies an alleged draft of the will cannot be considered the additional witness, within the design of the rule; nor are declarations of the decedent as to the contents or substance of the will available as an equivalent thereto.[1] If these two witnesses differ materially either as to the beneficiaries or the amount of the bequests, the will cannot be established.[2] The statute of Tennessee seems to differ somewhat from the usual statute; for a jury in that state were charged that "two witnesses were required to the *factum* of the will, but that two witnesses were not required to each particular fact; that one fact may be proven by one witness and other facts and corroborating circumstances may be proven by other witnesses;" and this was held to be a correct construction of the statute.[3] Where a statute was in force which required two witnesses to the contents in an action to probate or establish the will, and it was allowed in that state to prove the contents of a will before it was probated, in an action of ejectment it was held not necessary to prove the contents by two witnesses, one being sufficient.[4] In speaking of the same statute it was said that it seemed that in spite of it the existence of a clause in an instrument later than the one propounded as a decedent's will, *and revoking the latter*, might lawfully be proved by the testimony of a single witness, where the purpose was in proving it to show that the will propounded was not entitled to probate by reason of its revocation by the last clause in the later will.[5] The two witnesses necessary to enable the court to probate the will must testify to the whole will.[6] But there is no doubt that if two witnesses testify to one part and two others

[1] Collyer v. Collyer, 4 Dem. 53 (1886); S. C. 17 Abb. N. C, 328.

[2] Sheridan v. Houghton, 6 Abb. N. C. 234 (1879).

[3] Morris v. Swaney, 7 Heisk. 591 (1872), citing Johnston v. Fry, 1 Coldw. 100.

[4] Harris v. Harris, 26 N. Y. 433 (1863); reversing same case, 36 Barb. 88 (1861). See Matter of Ruser, 6 Dem. 31.

[5] Calligan v. McKernan, 2 Dem. 421 (1884).

[6] McNally v. Brown, 5 Redf. 372 (1882).

to another part, and so on, the proof would satisfy the statute.

Sec. 107. **Diversity of or conflict in evidence.**— In a Georgia case, in speaking of the conflict in the evidence as to the provisions of the will, it was said: "There is much conflict in the testimony which cannot be reconciled. But we think, after an attentive perusal of it, voluminous as it is, that it preponderates in favor of the verdict. And as the jury, whose province it was to weigh it in connection with the credibility of each witness, have pronounced upon it, and the court below has refused to set aside the verdict, we will not interfere with it."[1] It is evident that if the judge who wrote the opinion had been the trial judge he would have done as the jury and trial judge did. In another case it was said: "But where five witnesses are examined who do not concur as to the contents of the instrument, it will be rejected, though the witnesses may profess to speak with confidence."[2]

Sec. 108. **Only substance need be proved.**— Swinburn lays it down that the two witnesses need only testify "to the tenor of the will."[3] By the "tenor" of a will is meant "its purport and effect, as opposed to the exact words of it."[4] So in the present day, it is enough to prove the substance of the will without proving the precise statement of the language or terms used in it.[5] But this substance when proved must show "substantially the testamentary intentions of the testator."[6] In another case it was said, "the substantial parts of the paper;" by which is evidently meant

[1] Kitchens v. Kitchens, 39 Geo. 108 (1869); S. C. 99 Am. Dec. 453. See Burge v. Hamilton, 72 Geo. 624.

[2] Wyckoff v. Wyckoff, 1 C. E. Green, 401 (1863), citing Rhodes v. Vinson, 9 Gill, 169.

[3] 2 Swinburn, p. 14, pl. 4.

[4] Rapalje & Lawrence's L. Dict. "Tenor."

[5] Allison v. Allison, 7 Dana, 91 (1838); Davis v. Davis, 2 Addams, 223 (1844); McNally v. Brown, 5 Redf. 372 (1882); Morris v. Swaney, 7 Heisk. 591 (1872); Wyckoff v. Wyckoff, 1 C. E. Gr. 401 (1868). *Contra*, Tucker v. Phipps, 3 Atk. 359 (1746).

[6] Woodward v. Goulstone, 11 App. Cas. 469 (1886); S. C. 56 L. J. (P.) 1; 56 L. T. 790; 35 W. R. 337; 51 J. P. 307.

the formal parts as well as the disposing part of the will.[1] In Sugden's Case Lord Cockburn said, "if we have obtained the substance of the will, although the particular dispositions may not occur in the precise order stated by Miss Sugden, if we have got the substance, in my opinion that is abundantly sufficient."[2] The finding of the court or jury must necessarily contain the substance of the will.[3]

SEC. 109. **Examples of sufficiency of proof.**— A few examples of the sufficiency of the proof of the contents of a lost will are here added. A will was prepared and sent a testator, and was subsequently seen — signed by the testator and in the hands of his wife — by the father of the residuary legatee and devisee, who read over the will, and, immediately on his return home, made a pencil jotting of the names of the executors as well as of the several bequests other than the provisions for the wife; and five days before his death the testator told him that his will was still in existence, and that he had given it to a person whom he refused to name. For the purpose of having a codicil prepared, a second memorandum was made by him, from the words of the testator, of what he said the will contained, which agreed substantially with the first memorandum. After the death of the testator no trace of the will could be discovered; and a bill having been filed, probate was granted.[4] In a New York case application was made to probate a paper presented, which was opposed because of a later but lost will. It appeared that V., a clerk in decedent's attorney's office, and a fellow clerk, A., met the decedent in this attorney's office, two years after the execution of the will produced, where A. drew a will in accordance with the decedent's directions. Decedent, having mentioned the existence of a prior will, requested A. to insert a revocatory clause in the new paper, which A. said

[1] Jaques v. Horton, 76 Ala. 238 (1884).

[2] Sugden v. Lord St. Leonards, *supra*.

[3] Morris v. Swaney, 7 Heisk. 591 (1872).

[4] Bessey v. Bostwick, 13 Gr. Ch. (U. P.) 279 (1867).

he would do. When the will was completed it was read aloud to the decedent by A.; and was then duly signed by the decedent and attested by V. and A. It did not appear that the decedent knew the contents of the paper, except that he was advised thereof by the draftsman, nor that V. had any better or different sources of information upon the subject than the testator had. It was held that the only evidence of the existence of a revoking clause in the latter instrument was hearsay, and that contestant's case, *quoad hoc*, failed, A. not being a witness.[1] In Connecticut the following decision was made:

"In this case there is but a single witness. His irreproachable character and his ability to comprehend fully and express clearly the meaning of the will are unquestionable. His testimony is direct and positive as to all parts of the will, and, at the time of testifying, he appeared to be free from doubt or hesitation.

"On the other hand it must be remembered that the will is a long one, requiring from three to four hours' time in its preparation. It contains several sections or clauses, and there are quite a number of pecuniary and specific legacies, varying in amount from $300 to $50,000. Life estates with remainders to other parties and trusts are created. The will was written on or about the 6th of August, 1872. At that time the witness read it, but has never seen it since [this was in 1874], and it does not appear that he had any occasion to think or converse of or concerning it or its contents during all that time — a period of more than eighteen months. He has no copy or other memoranda to refresh his recollection, and it is not claimed that he is possessed of extraordinary powers of memory. Whether under these circumstances it is in the power of the witness to reproduce a reliable copy of the will may well admit of doubt. [It is not required to prove a copy, only the substance.] The difficulty — I might almost say impossibil-

[1] Calligan v. McKernan, 2 Dem. 421 (1884).

ity — of retaining in the memory of an ordinary person for so long a time all the provisions of a somewhat complicated will must be obvious to every one; and when, as in this case, there is no motive nor inducement to remember, and the whole subject has passed from the mind of the witness as a matter in which he had no special concern, if the contents of the will could be reduced to writing without material variance, not only in the language, but in the meaning and substance, it would be remarkable indeed.

"But, aside from this, it appears that the witness is a neighbor and friend of some of the principal legatees, and is himself a member of a parish which is also a legatee. When first spoken to on the subject he does not pretend that he was able to recall at once all the provisions of the will. It was only after thinking of the matter for several days, and after having one or more interviews with the widow, that he attempted to reduce it to writing. He then followed his own recollection, except in respect to one clause. In that his recollection differed from the impression which the widow from some source had obtained, and he prepared it according to her impression, thinking that he might perhaps be mistaken. Several days more elapsed, when the widow informed him that she gave up that point, and he then prepared a copy wholly from his own recollection, which is the copy propounded for probate. The doubt which he entertained with respect to that clause may, and under similar circumstances probably would, have existed with reference to other clauses of the will. However that may be, the doubt which did exist was removed, not by anything positive and certain, but by a mere effort of the memory, aided materially by the fact that the widow yielded her impressions. Under these circumstances, even if it be admitted that the mind of the witness was uninfluenced by these repeated interviews with the parties in interest and by his willingness to do them a favor, can we be quite certain that the copy produced is in substance a true copy of the original will? Is there not room for a reason-

able doubt? [The contents of a lost will do not have to be proved beyond a reasonable doubt. That strictness required in a criminal case is not required in this kind of a case.]

"Again, the copy propounded shows that some of the legacies and devises were subject to certain limitations and restrictions. [In Sugden v. Lord St. Leonards[1] the court said that there were ultimate remainders which the only witness did not remember, and even some legacies, yet the will as proved was probated; because not to probate it would work more mischief than to probate it.] While the memory may retain and be able to recall those restrictions and limitations generally, it is by no means certain that all will be remembered; and even those which are remembered may have been expressed in the original will in very different language from that employed in the copy before us. [If this reasoning is to be applied, in no case where no copy of the will has been preserved will it be possible to establish the contents and probate a lost will.] The importance of this will be appreciated when we remember that large interests may and often do depend upon the precise language used.

"The order in which all the bequests were made the witness does not remember with certainty, and the name of one of the legatees he had forgotten until it was suggested to him. These circumstances may not be very important in the present case, except as they tend to show that the recollection of the witness is not perfectly reliable in all respects.

"I can hardly believe that the interests which the witness had under this will had any perceptible influence upon his testimony; nevertheless it may in connection with his friendly feelings for the widow and other legatees have unconsciously induced him to be more confident in respect to the contents of the will than he otherwise would have been. I cannot say, therefore, that I think the witness was entirely

[1] 1 Prob. Div. 154 (1876); S. C. 34 L. T. (N. S.) 372; 24 W. R. 479; 45 L. J. P. & D. 49; 17 Moak, 453.

free from bias. The interest which he had, though slight, would have disqualified him from being a juror, and he himself regarded it as disqualifying him from acting as judge of probate in the settlement of the estate. Perhaps it would be too much to say that in no case can the contents of a lost will be established by the testimony of an interested witness, but if done at all the case should be a strong one in every other respect. On the whole I am of the opinion that the contents of this will are not proved with that degree of certainty which the law requires." [In contrast with this statement and its meaning, see the opinions in Lord St. Leonards' Case, cited above. The contrast is a remarkable one.][1]

[1] In re Johnson's Will, 40 Conn. 587 (1874).

CHAPTER IX.

PROOF OF A PART ONLY.

Sec. 110. **Entire will must be proved.**— It often happens that an entire will cannot be proved — only a part of it; and the question at once arises if the part proved can be probated and enforced. Upon this question the cases are very much at variance, and far from an agreement. Thus in a recent case it was said that, "When a testamentary instrument is lost or destroyed, it cannot be admitted to probate without clear and satisfactory proof of its whole contents." This language was limited to the whole of that part of the instrument devising property, and not to the revocatory clause, as is elsewhere shown.[1] Other cases are to the same effect.[2] In another Massachusetts case it was said: "Additional issues, affirming and denying what are alleged to be partial contents of the instrument in question, were properly refused, because the contents of the whole instrument must be proved before it can stand as a valid testamentary disposition."[3] So in an early case in England it was said that in a proceeding in chancery to recover a legacy the plaintiff must prove "the contents in the very words;" and "must also prove the whole will, though the remainder of it does not at all belong to or regard his legacy."[4] Where a statute required two witnesses to testify to the contents before it could be established, it was held that they must testify to the substance of the whole will.[5]

[1] Wallis v. Wallis, 114 Mass. 510 (1874).

[2] Sheridan v. Houghton, 6 Abb. N. C. 234 (1879); Vining v. Hall, 40 Miss. 83 (1866).

[3] Newell v. Homer, 120 Mass. 277 (1876).

[4] Tucker v. Phipps, 3 Atk. 359 (1746).

[5] McNally v. Brown, 5 Redf. 372 (1882).

In another case it was said that enough of the will must be proved as to admit of a legal construction;[1] and following somewhat in this line, it was said that the court must have before it substantially the testamentary intentions of the testator.[2]

Sec. 111. **Same, continued — Part sufficient.** — The rule laid down by the cases cited in the previous section has not been adopted by the majority of the courts, and even it has been slightly shaken by *dicta* in some of those identical cases, as appears in the next section. In a very early case the person claiming under a will prevailed, although he was able to prove only a part of it.[3] So in this country there are plenty of authorities to the effect that if a part of the will — part of the devising part — is clearly proved, such part may be probated and carried into effect.[4] In Sugden's Case it was urged that, as all the will had not been proved, so much as had been could not be probated. To this argument Cockburn, C. J., put this question: "Suppose a will to have been partly destroyed by fire or otherwise, is no effect to be given to that part which is left?" To this counsel said: "If a material portion had been destroyed, the effect of which could not be ascertained by other evidence, the part which remained could not be admitted to probate. There is no case in which a portion of a will has been admitted; in every case of the kind the substance of the whole will has been proved." The Master of the Rolls, Jessel, then asked: "Is there any case in which a portion of a will has been offered for probate, and probate has been refused?" The answer of counsel was: "In Montefiore v. Montefiore [5]

[1] Butler v. Butler, 5 Harr. (Del.) 178 (1877).

[2] Woodward v. Goulstone, 11 App. Cas. 469 (1886).

[3] Lawrence v. Kete, Aleyn, 54 (1647).

[4] Graham v. O'Fallon, 4 Mo. 601 (1837); Jackson v. Jackson, 4 Mo. 210 (1835); Dower v. Seeds, 28 W. Va. 112 (1886); Dickey v. Malechi, 6 Mo. 177 (1839); S. C. 34 Am. Dec. 130; Burge v. Hamilton, 72 Geo. 568 (1884); Chisholm v. Ben, 7 B. Mon. 408 (1847); Skeggs v. Horton, 82 Ala. 352 (1887); S. C. 2 So. Rep. 110.

[5] 2 Addams, 354.

probate was refused of an instrument which had been written to a certain extent by the testator, but not finished." To this the Master of the Rolls replied: "You could not tell what he intended to write before he had finished writing;" and James, L. J., added: "The *ratio decidendi* was that the court was not satisfied that there was evidence that the testator had come to a final resolution." [1]

Sec. 112. **Same, continued — Legacies unknown — Essential and substantial dispositions necessary.**— In Sugden's Case a few legacies and several small remainders were not proved, and it was admitted that such was the case. In passing upon the objection raised to the probate of the will for this reason, Chief Justice Cockburn said: "As regards the only remaining question, namely, whether, assuming that we have not before us all the contents of the lost will, probate should be allowed of that which we have so long as we are satisfied that we have the substantial parts of the will made out, I cannot bring myself to entertain a doubt. If part of a will were accidentally burnt, or if a portion of it were torn out designedly by a wrong-doer, it would nevertheless, in my opinion, be the duty of a court of probate to give effect to the will of the testator as far as it could be ascertained. It is not because some who would otherwise have benefited by the will may thus fail to profit by the intended disposition of the testator that his will should be frustrated and fail of effect where his intentions remain clearly manifest. It may be that in this will there were matters which Miss Sugden fails to remember — indeed, she has herself said that there were other remainders that she does not recollect. So far, therefore, we have the contents of the will before us in a defective form. It may also be that there are some few legacies — there cannot be many — which she does not recollect. They must be few, and they cannot have been of material consequence.

[1] Sugden v. Lord St. Leonards, 45 L. J. P. & D. 49; 17 Moak, 453. L. R. 1 P. D. 154 (1876); S. C. 34 L. T. (N. S.) 372; 24 W. R. 479; The case as reported in Moak's Reports has been used.

But we have the substantial testamentary dispositions brought to our minds, and it would not be right to enable any wrong-doer, or any accident — not putting it so high as an intentional wrong — which might happen to a will, and which would prevent the court which had to deal with it from being perfect master of its contents, to prevent the will from being carried into effect so far as the dispositions of the testator had become known. I think there could not be a more mischievous consequence; and although it may be unfortunate that the will cannot be carried into execution to the full extent of the testamentary dispositions of the testator, I think that of two evils or two inconveniences it is far better, where the court can see its way to the essentially substantial dispositions made in a will, that it should give effect to them, although possibly some of the intentions of the testator may not be carried into effect."[1]

Sec. 113. **Same, continued — Indorsing residuary legacy — Remainders.** — The Master of the Rolls gave an elaborate opinion on the point under discussion, and agreed with the chief justice. He stated it was admitted that there were some small legacies not proved, and that, as to the larger portion of the real estate, "there were some limitations over after the seven life estates, besides the estates limited to the issue of the tenants for life, the particulars of which she [Miss Sugden, the sole witness] does not remember, although she does remember that other estates were left amongst the members of the family. Therefore we have, in the one case, legacies no doubt of comparatively small amount, trifling in themselves, the particulars of which we are unable to discover; in the other case we have limitations, remote indeed, and unlikely to come into effect, but still which are undoubtedly omitted from the document of which probate has been granted; and the question which we have to decide is whether, under such circumstances as these, we can admit the will to probate at all?

"The argument as to the personal estate was this: It

[1] Sugden v. Lord St. Leonards, *supra*.

was said, if it is proved to your satisfaction that legacies are omitted, then, by granting probate of the will which disposes of the residue, you are giving a larger proportion of the personal estate to the residuary legatees than was intended by the testator, and in so granting probate you are not only not performing the intention but you are acting contrary to the intention of the testator. This argument appears to me to be fallacious — it turns on the use of the word 'intention.' It seems to me that the testator may be said to have in this respect two intentions. He has a primary intention that the legatee, whether general or specific, shall take the legacy; he has a secondary intention that, if by any reason whatsoever that legacy cannot take effect, then it is to go, not to his next of kin, but to his residuary legatees. It may well be that we are not able to give effect to the primary intention, but we certainly are able to give effect to the secondary intention; and I see no reason why we should not give effect to the secondary intention because the circumstances which have happened have made it impossible to carry out the primary one to the extent of the legacies, the amount of which, and the names of the legatees of which, we do not know. This is by no means a new version of the law. We are familiar with the law as to personal estate as it existed before the Lost Wills Act, which has been extended by that act to devisees of real estate. I mean the rule that lapsed or void bequests fall into the residue. Now, the rule which was established by the judges before the legislature confirmed it by the Wills Act meant this: not that the testator whose whole property was, say, £11,000, and who gave £10,000 to his son and the residue to his nephew, not calculating that his son would die in his life-time, intended the £11,000 for the nephew, because everybody knows that a testator, in the absence of express provision to the contrary, contemplates the survival of his legatee; but it meant this: that he intended that particular nephew to take whatever was left of the personal estate, under whatever circumstances the res-

idue might be increased. In the case of lapsed bequests the intention was entirely defeated; in the case of void bequests — say that the testator being possessed of £11,000, consisting wholly of mixed personalty, gives £10,000 to a charity and the residue to A. B., a stranger — it might well have been said he would not have preferred that stranger to his next of kin, had it not been that he died in the belief that the bulk of his fortune would be devoted to charity; and to say that that which the charity cannot take shall go to augment the residue in favor of the residuary legatee, a stranger, is entirely contrary to the intention which might naturally be imputed to the testator. But the law is clear upon the subject, that, the primary intention not being capable of being carried out, because the charity cannot take, the residuary legatee takes the fund, although it was certainly not the primary intention of the testator. The same principle was extended to the case where it was uncertain who the legatee was. The uncertainty might arise in various ways: the handwriting of the testator (and this has happened in holograph wills) might be so bad that it was impossible to read the name of the legatee, and there was no other description by which to identify it. In that case the intention of the testator was certainly to benefit the legatee to the extent to which he was mentioned, yet, in the uncertainty as to his name, the sum given to him fell into and augmented the residue. Or the uncertainty might arise from other causes: the legatee might be so imperfectly described that it was impossible to ascertain who he was; there might be two or more persons answering the description and no evidence to distinguish between them. In that case the law did not divide the legacy between these two or more persons, but again held that the legacy failed, and that the amount fell into the residue.

"Now what difference is there in principle between the cases I have mentioned and the cases which have been alluded to by the lord chief justice? Take the case of a candle falling on a will and obliterating the name of the legatee;

why should there be more difficulty in the court granting probate with the name omitted by reason of a candle, or a chemical liquid, having fallen upon it after the death of the testator, than by reason of the illegibility of his handwriting, or of the uncertainty from the description of the will who the legatee was? There is no difference as to the intention; in all the cases there is a primary intention which is defeated, and a secondary intention to which effect is given. It appears to me there is no difference at all in principle. But is there any difference where the loss of legacies arises, not from actual obliteration upon the face of the will itself, but from obliteration from the tablets of the memory, so to speak, of the witnesses whose testimony is admitted as secondary evidence of the contents of the will? It seems to me that in principle it can make no difference whatever; and therefore there is no objection upon this ground in granting probate as regards the personal estate. Lastly, it appears to me that there are numerous decisions in the old ecclesiastical courts,[1] which would be followed in the present court of probate, confirming this view. I mean those cases, many of which are reported, in which probate has been granted of a will, although it was proved that one or more codicils had existed also. In other words, probate has been granted of part of the whole testamentary instrument, because the will and codicils together make the testamentary instrument; and it does not matter for this purpose whether it is a portion of the will or a portion of the codicil which is lost. I may mention that there are also decisions by which probate has been granted of a codicil or codicils, although the will itself was lost. Therefore, these decisions show that the mere fact of its being known that a portion of the testamentary instrument is wanting is not

[1] It may be observed here that it has been said of the report of the cases of those courts that they are excellent authorities, although not binding on the courts in this country. Apperson v. Cottrell, 3 Port. 51 (1836); S. C. 29 Am. Dec. 239, 242; Betts v. Jackson, 6 Wend. 173.

sufficient to prevent the court from granting probate of that which is left, it being satisfied that what is left is substantially correct as far as it goes. I think this disposes of the argument as to intention as regards the personal estate.

"As regards the *real estate*, the matter stands upon a somewhat different footing. As to that we have, assuming that the evidence is to be relied upon, limitations of the real estate, which are perfect so far as they go. As regards what have been called the principal estates, which are, in a sense, attached to the peerage, all Miss Sugden says is that these were limitations after those she has mentioned amongst the testator's family; but as there were seven life estates, followed by limitations in tail, it seemed so absurd to think of the ultimate remainders that she says, 'I never thought much about it.' So what is missing is something which, if it existed and could be proved, would damage the heir at law to the extent to which these subsequent limitations could take effect; but the omitting them from the probate cannot, as I have said before, injure him, but must benefit him. It does not seem to me, therefore, that he can have any ground of complaint at there not being any residuary devisees as regards those estates."[1]

In a very early case it was held sufficient for the purposes of the defense in an action of ejectment to prove that part of the will giving a life estate in the real estate in controversy, although it could not be shown to whom the remainder went.[2] In a quite recent case a legacy of $500 was shown, but the name of the legatee was not. The verdict of the jury made no reference to it, but contained a finding of a general residuary devise. The will as found was established, but the query was raised where this particular legacy should go.[3] So in another American case it was held that the will is valid only as to those devises proved, and may be so established.[4]

[1] Sugden v. Lord St. Leonards, *supra*.

[2] Lawrence v. Kete, Aleyn, 54 (1647).

[3] Skeggs v. Horton, 82 Ala. 352 (1887); S. C. 2 So. Rep. 110.

[4] Steele v. Price, 5 B. Mon. 58 (1844). In this case a question of

SEC. 114. **Rule modified — Revocatory clause proved.** — While in Massachusetts it is held that the whole will must be proved, an inclination, or intimation rather, that the rule would be modified under peculiar circumstances is manifest from the language of the court. Thus: "It is not such a will as may be proved in part and disproved in part. The testator undertook to make a distribution of his estate in certain shares between his wife and children; and unless the whole can be proved, his intention will not be effectuated, and therefore no part of the will can be established."[1] This question of the testator's intention is very well disposed of in Sugden's Case.[2] But the court has not adhered to the rule thus laid down in this quotation, of adhering to the testator's intention. Where only the revocatory clause was proved, it was used to prevent the probate of an earlier will. "If it can be proved that a later will was duly executed, attested and subscribed, and that it contained a clause expressly revoking all former wills, but evidence of the rest of its contents cannot be obtained, it is nevertheless a good revocation; and it can be made available only by allowing it to be set up in opposition to the probate of the earlier will, in accordance with the practice established in the English ecclesiastical courts before the Declaration of Independence, and adopted by the courts exercising similar jurisdiction in New York and New Jersey."[3] So in Mississippi, where the whole will must be proved to have it probated or established, it was held sufficient to prove the revocatory clause of a later will to prevent the probate of the earlier one.[4]

practice arose. An appeal had been taken to the circuit court, and that court established more of the will than the county court had. This was held not to be error, the evidence sustaining the finding.

[1] Davis v. Sigourney, 8 Met. 487 (1844).

[2] Sec. 113.

[3] Wallis v. Wallis, 114 Mass. 510 (1874).

[4] Vining v. Hall, 40 Miss. 83 (1866).

CHAPTER X.

LOST SUBSEQUENT WILL — RECALLING PROBATE OF FORMER WILL.

Sec. 115. **Defeating probate of prior by showing subsequent but lost will.**— It is a good defense to a petition to probate a will that there was executed a subsequent will which revoked it, even though the latter is lost; and no special statute is necessary to authorize a probate court to receive such evidence;[1] nor does the statute requiring the testimony of two witnesses to its contents apply.[2] Such subsequent will may be proved by parol evidence;[3] and no objection lies that the will is the best evidence, for it is lost.[4] But merely proving the fact of the execution of the subsequent will is not sufficient, for there is no presumption that it revoked the former; the contents of the will must be shown, and these must contain revocatory words, or show such an inconsistency between the two wills that both cannot stand.[5] Thus, in a special verdict it was found that in 1748 the testator made a will, and it was set out; that in 1756 he made another, duly attested, making a different disposition of the property from the one made in 1748, but in what particulars was unknown to the jurors. The jurors said that they did not find that he canceled or destroyed the will of 1756; but what became of it they did not know. The court decided that although the will of 1756 contained a different

[1] Sec. 9.

[2] Secs. 9, 105.

[3] Legare v. Ashe, 1 Bay (S. C.), 464 (1795); Goods of Brown, 1 Sw. & Tr. 32 (1858); S. C. 4 Jur. (N. S.) 244; 27 L. J. (P. D.) 41.

[4] Hope's Will, 48 Mich. 518 (1882).

[5] Cutto v. Gilbert, 9 Moo. P. C. 131; Nelson v. McGiffert, 3 Barb. Ch. 158 (1848); S. C. 49 Am. Dec. 170; Hutchins v. Bassett, Comb. 90; S. C. *sub nom.* Hitchins v. Basset, 3 Mod. 203; 2 Salk. 592; Hungerford v. Nosworthy, Shower, P. C. 146.

disposition from the one of 1748, yet as the particulars of that difference were unknown, it would not hold, from these facts, that the latter revoked the former. This was the decision in the common pleas.[1] On appeal to the king's bench this decision was reversed, the court holding that the latter will revoked the former; Justice Nares saying, "the second will is not found to be canceled or destroyed; therefore it must be considered as in being." The chief justice, De Grey, said: "When a man hath once declared properly what his mind is as to the disposition of his lands, upon doing that he is presumed to continue of the same mind till his death, unless the contrary appears."[2] But on appeal the decision of the king's bench was reversed by the house of lords, and that of the common pleas affirmed.[3] In a Pennsylvania case the report of this English case as it was decided in the king's bench is followed.[4]

Sec. 116. **Revoking probate of former will.**— When a subsequent will is discovered or proved, which amounts to a revocation of a former will already probated, a question of the revocation of the probate of the former will arises. In speaking on this subject the supreme court of Rhode Island said:

"Our statutes nowhere recognize in express terms the power of our courts to revoke a probate once granted by them, leaving that just and necessary power to be implied from their general power to 'take the probate of wills, and grant administration on the estates of deceased persons.' No one can suppose, however, that such power of revocation does not exist in them; else, if probate of a will be granted, and the time of appeal be passed, inasmuch as their jurisdiction is exclusive, there would be no mode in which a later will of the testator, subsequently found, could be proved, without the inconvenience of leaving out, at the

[1] Harwood v. Goodwright, 3 Wils. 497; 2 H. Bl. 937.

[2] Cowper, 88 (1774).

[3] Jones v. Murphy, 8 W. & S. 275 (1844). See Betts v. Jackson, 6 Wend. 173 (1830).

same time, conflicting authorities, issuing from the same source, and with regard to the settlement of the same estate. Now it would seem to be quite congruous with the statute mode of conferring this power of revoking the old probate, to wit, as incidental to the power of taking probate of the later will when discovered, for the court to exercise this power of revocation, as incidental to the new grant of probate, rather than to make it necessarily the subject of preliminary and separate action. Such a practice would save the delay and expense of double proceedings, and enable the court to revoke or modify the old probate, as the old will utterly conflicted or was capable of partially standing with the new. Notice of the petition for the probate, or for filing and recording of the new will, must necessarily be given to the parties interested under the old one; and the prayer of such a petition incidentally involves the revocation of the probate of the will of prior date, so far as such will conflicts with the provisions of the will of later date. We can perceive no danger of confusion or injustice in allowing this double, but dependent, duty to be performed by the court upon a mere petition for the probate of the later will; and its simplicity and directness commend it, as a matter of practice, in other respects, to our favor. Without doubt, the probate of the first will must stand as conclusive upon the courts of common law and chancery until revoked by proper proceedings in the appropriate court; and the practice in the English ecclesiastical courts probably is not, in general, to grant probate of the later will until service of a citation calling upon the executor of the prior will to bring it in for revocation. Yet this rule of practice is amenable to circumstances; and in the late case of Wilkinson v. Robinson,[1] probate of the later will was taken by the prerogative court, notwithstanding a decree ordering the executrix of the former one to bring it in, in order that the probate of it might be revoked and that probate of the second will might be granted,

[1] 14 Jur. 72.

could not be served upon her,— she residing in France, and avoiding the service of the decree. . . . Without deciding, therefore, that such a power of revocation may not be exercised upon direct application to the court for that purpose, we have come to the conclusion that it may be exercised upon a mere application to take probate of, or allow to be filed and recorded a copy of, the later will, as incidental thereto."[1]

A will of 1818 was probated in 1870. In 1845 another paper was presented, dated 1828, to the same court. It was held that the court had the power, whether it revoked the former or not, to probate the latter.[2] That the court has the power to recall or revoke the probate of a former will is clearly established by the English cases.[3] The probate cannot be attacked for fraud.[4] The letters of administration will not be revoked unless the will is found or proved, and not on a promise to bring proceedings to establish it.[5] The grant of letters of administration does not estop any one from bringing an action to establish the will,[6] unless the propounder of the will was in some way, in case of the probate of a former will, connected with the probate of such former will as to render it inequitable to allow him to insist on the establishment of such later will.[7] If the distributees of an estate do not claim as legatees under the will they are not estopped; nor can the executor *de son tort* claim they are for them.[8] Nor is an administrator who

[1] Bowen v. Johnson, 5 R. I. 112 (1858), citing Campbell v. Logan, 2 Bradf. 90, and Schultz v. Schultz, 10 Gratt. 358, to same effect.

[2] Schultz v. Schultz, 10 Gratt. 358 (1853); Reed's Will, 2 B. Mon. 80.

[3] Bradford v. Young, 26 Ch. Div. 656 (1885); S. C. 54 L. J. Ch. 96; 50 L. T. 707; 32 W. R. 901; Priestman v. Thomas, L. R. 9 P. D. 210 (1885); S. C. 53 L. J. (P.) 109; 51 L. T. 843; 32 W. R. 842, affirming L. R. 9 P. D. 70; S. C. 53 L. J. (P.) 58; Pinney v. Hunt, 6 Ch. Div. 98.

[4] Hall v. Gilbert, 31 Wis. 691 (1873); Holden v. Meadows, 31 Wis. 284 (1872); Gaines v. Chew, 2 How. 619 (1860).

[5] Holland v. Ferris, 2 Bradf. 334 (1853).

[6] Bulkley v. Redmond, 2 Bradf. 281 (1853).

[7] Burns v. Travis, 117 Ind. 44; 18 N. E. Rep. 45 (1888).

[8] See Clarke v. Goodrum, 61 Miss. 731 (1884).

has procured a fraudulent decree rejecting a will estopped from afterwards having it overruled and the will probated.[1]

Sec. 116*a*. **Effect of setting aside probate without revoking former will.**—"When a court recalls the probate of a will, substituting the probate of another will by the same testator made posterior to the first, the former becomes inoperative, and the second is that under which the estate is to be administered, without any formal declaration by the court that the first was annulled, and it makes no difference that a part of the estate has been administered under the first probate. The unadministered must be done under the second." The court cannot, however, order the will destroyed, nor revoke it, although it may declare that it has been revoked.[2] Where the court refused to probate a will, and an appeal was taken, pending which probate was granted, it was held that the letters of administration on reversal must be revoked, and letters granted to the executors named in the will.[3]

Sec. 117. **Codicil found after probate of will.**— If a codicil is found after the will of which it is a part is probated, the codicil may be admitted to probate.[4] Where a will had been admitted to probate, and after the time for appealing from the decree had passed, it was held that it might admit to probate a codicil of the same will, written upon the back of the same leaf upon which the will was written, if the codicil escaped attention and was not passed upon at the time of the probate of the will.[5] A statute authorizing a court to admit to probate a lost will applies to a lost codi-

[1] Brookie v. Portwood, 84 Ky. 259 (1886).

[2] Gaines v. Hennen, 24 How. 553 (1860). See Schultz v. Schultz, 10 Gratt. 358 (1853).

[3] Patton's Appeal, 31 Pa. St. 465 (1858). Where a will was found after administration granted, the administrator and his sureties were held liable to those entitled as legatees under the will. Hunt v. Hamilton, 9 Dana, 90 (1839).

[4] Clark v. Wright, 3 Pick. 67 (1825); Schultz v. Schultz, 10 Gratt. 358 (1853); Davis v. Davis, 2 Addams, 223 (1844).

[5] Waters v. Stickney, 12 Allen, 1 (1866). See, also, Campbell v. Logan, 2 Bradf. 90 (1852).

cil. Where a testator revoked the eleventh, twelfth and thirteenth devises of his will by a codicil, and then detached and destroyed them, it was held that a court of chancery had power to restore them, although the will, without these clauses, and the codicil had been probated. The probate of the codicil did not bind the plaintiff, who had an interest only by the destroyed clauses.[1]

[1] Hook v. Pratt, 8 Hun, 102 (1876).

CHAPTER XI.

COMPETENCY OF WITNESSES.

SEC. 118. **Proof of search.**— Even though a witness be interested in the establishment or probate of the lost will as legatee or the like, he is competent to testify to the loss and search for the lost instrument. In this all the cases agree.[1]

SEC. 119. **Proof of contents.**— Whether or not an interested witness may testify to the execution or contents of the lost will is a matter of some controversy among the courts. In Missouri it was held in an early case that he was competent, on a petition to probate. The court said:

"Any other construction of the law would lead to intolerable consequences. A party seeking to establish a lost will is bound to cite the heirs at law. The relations of a testator are most likely to be the persons most conversant with his intentions, and around and about his person and house during his last illness. If the testimony of all these persons must be excluded on the ground of their being parties, and they are necessarily made parties in such proceedings, it must become exceedingly difficult in most cases, and in many cases absolutely impracticable, to establish most of the facts necessary to authorize the probate of a lost will. It places it in the power of the persons most likely to be interested in suppressing the will to shut out all investigation and shield themselves under a rule of law from all responsibility. Such a state of things could never have been contemplated either by our statute law regulating proceedings to establish wills, or sanctioned by the common-law

[1] Betts v. Jackson, 6 Wend. 173 (1830); Jackson v. Betts, 9 Cow. 208 (1828); Dan v. Brown, 4 Cow. 483 (1825); S. C. 15 Am. Dec. 395; Apperson v. Cottrell, 3 Port. (Ala.) 51 (1836); S. C. 29 Am. Dec. 239.

rules of evidence."[1] So it has been held the same way in a number of states.[2] Of a legatee it was said that he is neither a party to the probate proceedings, nor one "in whose immediate and individual behalf" the proceedings are wholly or in part had, within the meaning of the statute.[3] A statute excluded as a witness either party "against the other to testify to any transaction with or statement by any deceased person whose estate is interested in the result of the suit;" and this was held not to exclude a legatee or devisee. "This exception does not disqualify the witness from testifying about other matters than such statements or declarations." It will thus be perceived that the witness was not allowed to testify concerning the declarations or statements of the testator, his testimony being limited to those facts he knew outside of these.[4] Of course interest goes to the credibility of the witness.[5]

Sec. 120. **Witness not competent.**— An early Missouri case took a middle course. An heir was a witness, and he was also a legatee under the last will. It was said that his competency depended upon the fact whether he took more by the will or by intestacy. It appeared that in case of intestacy he would get $285,000; under the will $50,000 with a remote contingency not of much value. He was held to be a competent witness for the will.[6] A statute provided that where a person is dead, and the action is brought against his executors, administrators, heirs at law, next of kin or assignee when they have derived their rights

[1] Dickey v. Malechi, 6 Mo. 177 (1839); S. C. 34 Am. Dec. 130.

[2] Kidder's Estate, 66 Cal. 487 (1885); S. C. 6 Pac. Rep. 326; Tucker v. Whitehead, 59 Miss. 594 (1882) (legatee); Wyckoff v. Wyckoff, 1 C. E. Gr. 401 (1863) (legatee); Mercer v. Mackin, 14 Bush, 434 (1879) (devisee); S. C. 1 Am. Prob. Cas. 399.

[3] Lawyer v. Smith, 8 Mich. 411 (1860); S. C. 77 Am. Dec. 460.

[4] Conoly v. Gayle, 61 Ala. 116 (1878).

[5] Wyckoff v. Wyckoff, 1 C. E. Gr. 401 (1868); Sugden v. Lord St. Leonards, 1 P. D. 154 (1876); S. C. 45 L. J. (P. & D.) 49; 24 W. R. 479; 34 L. T. (N. S.) 372; 17 Moak, 453.

[6] Graham v. O'Fallon, 4 Mo. 601 (1837). It will be observed that this is an earlier case than Dickey v. Malechi, *supra*.

or cause of action immediately from such deceased person, then the opposite party cannot be examined as a witness in his own behalf in respect to any transaction or communication he had personally with the deceased. In a suit to set up a lost will by the devisee, the latter was held incompetent to testify against the executor and next of kin.[1] In an action in ejectment it was sought to prove the contents of the grandfather's will. It appeared that this ancestor died, leaving his son, "father of the lessor of the plaintiff, his only son and heir at law;" and the offer was to prove the destruction and contents of this will, by the wife of the son of the lessor, which would have put the land in controversy in a grandson, "the lessor of the plaintiff." The question was "whether the wife of the plaintiff's father is a competent witness to prove that her husband destroyed his father's will, although she had released her dower in the premises to the defendant's father;" which release was a fact shown by the record. It was held that "she was a competent witness to prove the destruction of the said will, and that her credibility was left to the jury."[2]

[1] Timon v. Claffy, 45 Barb. 438 (1865).

[2] This is the whole of the opinion. Wilmot v. Talbot, 3 H. & McH. 2 (1793); S. C. 1 Am. Dec. 374.

CHAPTER XII.

TRIAL — ISSUE — VERDICT — DECREE — COSTS — INNOCENT PURCHASERS.

SEC. 121. **Trial.**— In matters of probate the court usually hears the evidence and determines the controversy. It has already been stated that some courts deny the power of a probate court to set up and probate a lost or destroyed will unless especially empowered by statute; but that there is a decided inclination to hold that if it possess all the powers of a court of chancery to examine into the controversy, to call a jury and frame an issue *devisavit vel non*, such court has full power to try the matter and probate the will.[1]

SEC. 122. **Jury.**— The right to a trial by jury frequently depends upon a statute; for if one expressly gives it, a jury may be demanded as of course, but if not demanded it is waived.[2] A court of chancery may of its own motion frame an issue and submit it to the jury; and to this no exception can be successfully taken.[3]

SEC. 123. **The issue.**— In all such cases the issue is framed by the court, and is the issue *devisavit vel non* — "did he devise or not."[4] The practice in this respect does not differ from that when the probate of a will produced is contested. In a Tennessee case the issue was as follows: "The complainants come and aver that James M. Swaney left at the time of his death a will, in which he gave, after the

[1] Secs. 5, 11.

[2] Jaques v. Horton, 76 Ala. 238 (1884); Dower v. Seeds, 28 W. Va. 112 (1886); S. C. 57 Am. Rep. 646.

[3] Idley v. Bowen, 11 Wend. 227 (1833).

[4] Dower v. Seeds, 28 W. Va. 112 (1886); S. C. 57 Am. Rep. 646. The above case contains a long discussion of the practice in framing and submitting such an issue. Dawson v. Smith, 3 Houst. (Del.) 335 (1866).

payment of his debts, all of his estate, both real and personal, of which he might be possessed, to Eliza Morris for and during her natural life, and at her death to her children by the said J. M. Swaney, to be equally divided between them, and that said will has been lost or destroyed or suppressed, either by accident or fraud, and they ask that the same be inquired of by a jury of the country."[1] In another case an issue *devisavit vel non* was framed to ascertain whether the testator, on the 3d of May, 1825, was of sound mind, memory and understanding, and competent to devise and bequeath his real and personal estate; also whether he was competent to make a will on the 3d day of April, 1825, and did on that day make a will disposing of his property in the manner alleged in the bill; and also whether he did, at any time after the execution of the last-mentioned paper, revoke the same.[2]

Where an action was brought to probate a will of Wm. H. Bordman which, with three codicils, it was alleged, was lost, the court framed the following issues:

"1. Whereas the said appellant affirms and said respondents deny that the said Bordman deceased leaving a will duly executed, of which the paper annexed to or embodied in the appellant's petition is a true copy.

"2. Whereas the said appellant affirms and said respondents deny that said will was concealed, suppressed or destroyed by the respondents, or by some of the heirs at law of said deceased, or by Frederic O. Prince, or some one else acting in their behalf.

"3. And whereas said appellant affirms and said respondents deny that said Bordman deceased leaving a codicil duly executed by him, of which the paper marked B, annexed to said petition, is a true copy.

[1] Morris v. Swaney, 7 Heisk. 591 (1872).

[2] Idley v. Bowen, 11 Wend. 227 (1833). Usually proof of the sanity of the testator at the time he executed the will is not required unless proof of insanity is first introduced by those opposing the probate or establishment of the will. Anderson v. Irwin, 101 Ill. 411 (1882).

"4. And whereas the said appellant affirms and said respondents deny that said codicil was concealed, suppressed or destroyed by the respondents, or by some of the heirs at law of said Bordman, deceased, or by Frederic O. Prince, or by some one else acting in their behalf.

"5. And whereas said appellant affirms and said respondents deny that said Bordman deceased leaving a codicil duly executed by him, of which the paper marked C, annexed to or embodied in the appellant's petition, is a true copy.

"6. And whereas the said appellant affirms and said respondents deny that the said codicil was concealed, suppressed or destroyed by the respondents, or by some of the heirs at law of said deceased, or by Frederic O. Prince, or by some one else acting in their behalf.

"7. And whereas the said appellant affirms and said respondents deny that the said Bordman deceased leaving a codicil duly executed by him, of which the paper marked D, annexed to or embodied in the appellant's petition, is a true copy.

"8. And whereas the said appellant affirms and said respondents deny that the said codicil was concealed, suppressed or destroyed by the respondents, or by some of the heirs at law of said Bordman, deceased, or by Frederic O. Prince, or by some one else acting in their behalf.

"And whereas the said respondents affirm and the said appellant denies that if the said Bordman did decease leaving any such codicil as is alleged in the appellant's petition, he, at the time of executing the same, was not of sound mind:

"Now, therefore, it is ordered that a jury be impaneled to try said issues."

Other issues were requested by the appellant, praying for a finding as to whether certain bequests, among others not specified, were contained in the will, but these were refused, "because the contents of the whole instrument

must be proved before it can stand as a valid testamentary disposition."[1]

SEC. 124. **Two wills — Double issue — Interest.** — Cases of some difficulty occasionally arise in the probate or establishment of a lost or destroyed will. If the lost will is the last one in point of time, where a previous one has already been probated, little or no difficulty will arise by reason of such fact; for if the last one contains a clause revoking the former, or is such an one as to work its revocation by reason of its terms being inconsistent therewith, all the propounder has to do is to succeed in getting the lost and last will probated, and thereby the former one will be annulled.[2] So if it is only a partial revocation, his aim must necessarily be the same. But suppose the will sought to be established or probated was the earlier in point of time and the last will revoked it; then a double issue may be raised. It may be averred that the last will was procured by fraud, duress or undue influence, or the testator at the time of its execution was insane or incapable of making a will; and that the same pernicious causes brought about the destruction of the former and lost will. In such a case it is absolutely necessary to set aside the probate of the more recent will. If the contestant is an heir, he has interest enough to enable him to bring an action solely for the purpose of setting aside the probate (when probate has been had) of the last will or to enable him to resist its probate; and if successful, he may then bring an action, if a legatee or devisee thereunder, to probate or establish the lost will. But another difficulty may arise. Suppose he is not an heir, but only a legatee or devisee under the former but lost will, and that will is not admissible in evidence for any purpose until probated. He must necessarily aver and prove his interest, and he can only do so by showing the contents of the lost will. If he simply brings an action to probate the

[1] Newell v. Homer, 120 Mass. 277 (1876). A statute authorized the framing of an issue in such a case.

[2] Sec. 116*a*.

lost will, the answer would be that there is a later will which revokes the lost one; and this later will may or may not be probated; if probated, the propounder of the lost will may find himself, in that case, concluded by the probate, because of the rule that he cannot attack it collaterally; but if he is not thus concluded, he may reply that the probated will was procured by fraud, undue influence, or the testator was insane at the time of its execution. In that event a double issue is raised: one to prove and probate the lost will, and the other to set aside the probate of the later, or that it, if not probated, was procured by fraud, or the like.

But the petitioner may see fit to pursue another course. He may file the usual petition to prove the lost will and therein attack the probated will on the grounds of fraud and the like, and ask that the probate be set aside. In this event he raises a double issue also; and is in perhaps as good a position as he would be to pursue the other course.

Now, in either of these events, can the issues raised be disposed of by a jury; for it would seem necessary that they be disposed of at the same trial, so interlaced and involved are they with each other. Several cases hold that both questions may be disposed of in the one action.[1] In New York a case of this kind arose in which it was said: "That part of the bill which seeks to set aside the last will might still be demurred to if the question as to the validity of that will was not directly connected with the establishment of the first. But if that will is valid it is a revocation of the first, and the complainants cannot succeed in their suit to establish the first will, even if they show that it was improperly destroyed without the knowledge or consent of the testator. The part of this case, therefore, over which this court has an unquestionable jurisdiction, necessarily draws to it the decision of the question as to the validity of the last will. The defendant, however, in her answer, may insist that the first will was destroyed by the testator

[1] Vance v. Upson, 64 Tex. 266 (1884); Scoggins v. Turner, 98 N. C. 135 (1887): S. C. 3 So. Rep. 719.

or with his consent; and may then object to the jurisdiction of the court to decide upon the question of the validity of the last will as between her and the heir at law. And in that case, if the complainants do not succeed in establishing the fact that the first will was illegally destroyed, their bill must be dismissed without awarding an issue to determine the validity of the last will as between Mrs. Idley and her co-defendant; leaving the heir of the decedent to her remedy at law by action of ejectment. This could not be done as the cause stood at the original hearing before the vice-chancellor.[1] The two children who were then supposed to be heirs at law were complainants, and no objection was made in the answer of the defendant to the jurisdiction of the court to determine the question as to the validity of the last will, if the allegation as to the fraudulent destruction of the first was not sustained. It was, therefore, a matter of course to award an issue *devisavit vel non*, to determine the question as to the last will, even if the complainants had not succeeded in proving the fraudulent destruction of the first. For if the first was destroyed by the testator or by his direction, yet if the last was illegal the plaintiffs would be entitled to the property under their prayer for general relief. If this amendment is allowed and the infant heir of the testator is made a defendant, she will therefore have a right to insist that Mrs. Idley is a necessary party to establish either will; as the infant may contest the validity of both." [2]

In West Virginia a somewhat different course was pursued, it being said that the plaintiff could show by affidavit his interest in the controversy. A statute of that state provided that " After a sentence or order (admitting to probate or refusing to admit to probate a paper as a will), a person interested, who was not a party to the proceedings, may,

[1] See the case of Bowen v. Idley, 4 Edw. Ch. 148 (1851). Same report in statement of case to Idley v. Bowen, 11 Wend. 227 (1833).

[2] Bowen v. Idley, 6 Paige, 46 (1831). See the same case on appeal, Idley v. Bowen, 11 Wend. 227 (1833).

within five years, proceed by bill in equity to impeach or establish the will; on which bill, if required by either party, a trial by jury shall be ordered to ascertain whether any, and if any, how much, of what was offered for probate be the will of the decedent. If no such bill be filed within that time the sentence or order shall be forever binding." [1] In passing upon a case of the kind under consideration, the supreme court of that state said:

"The court in chancery directed an issue to be tried 'to ascertain whether any, and if any, how much, of the paper probated in the county court of Mason county, West Virginia, on the 24th day of January, 1876, was the will of John J. Weaver, deceased.' This is the issue which the statute required to be tried by the jury. And it can, as we have seen, neither be enlarged nor restricted by the pleadings in this case. It would have been an error in the circuit court to have directed the trial of such an issue, as the appellants now in this court insist it should have directed; that is, 'how much, if any, of the two instruments named in the bill as executed by John J. Weaver was and is his will.' As we have seen, the court had no authority in that case to do more than to have determined by a jury under its supervision the single question whether the paper which had been probated was or was not the will of the deceased, and then to render its decision accordingly.

"But it is claimed that it had no authority to direct such an issue till the plaintiffs had proved themselves interested in the question by proving the will of 1868, under which they claimed. This is a strange position. If they had been required to prove this, it would obviously have been the duty of the court, at the instance of any of the parties, to have proved it in the manner which the law requires; that is, by a verdict of a jury that the will of J. J. Weaver, of 1868, was made when he was of disposing mind and memory, and was executed in the manner required by law. And thus instead of only one question to be decided by the

[1] Code of W. Va. p. 483.

jury under the direction of the court, as required by the statute, another question of like character and difficulty would have to be decided in like manner by a jury and the court. This would be, as we have seen, an obvious violation of the statute.

"But it may be asked, can any one, by setting up a pretended claim in the bill, utterly unfounded, contest in this way any will, though the plaintiffs have no real interest in the question whether it be or be not the will of the decedent?

"I answer that they cannot; for at the instance of the defendants the court would issue a rule against the plaintiffs to show cause why their bill should not be dismissed because they were abusing the process of the court in a matter in which they had no *bona fide* claim of or to any interest. And if on the trial of such a rule by the court without any intervention of a jury it appears that the plaintiffs had no claim or pretense of claim to any interest in the subject of controversy named in the bill, then their suit would be dismissed.

"But the inquiry in this case on such a rule would not have been whether John J. Weaver was competent in 1868 to make a will and did make such a will as stated in the bill, but simply whether the plaintiff set up a *bona fide* claim that such a will had been made. On such a rule in this case the affidavit of the widow of John J. Weaver to the facts stated in her answer would alone have been ample to prove that the claim of the plaintiffs to an interest in the question in controversy in the cause was obviously *bona fide*, and the rule would have been dismissed."[1]

Sec. 125. **Verdict or finding.**— The verdict of the jury is not binding upon the court,[2] especially in a court of chancery, unless made so by statute.[3] The verdict or finding of

[1] Dower v. Church, 21 W. Va. 47–49 (1882).

[2] Idley v. Bowen, 11 Wend. 227 (1833); Timon v. Claffy, 45 Barb. 438 (1865).

[3] Morris v. Swaney, 7 Heisk. 591 (1872).

the court must necessarily contain the substance of the will set out.[1] This may be done by finding in favor of the plaintiffs and referring to the copy of the will, when it is set out, by saying that it is a substantial copy.[2] Often the verdict partakes of the nature of a special verdict — "that James Cottrell did make a will, of which the instrument produced is in substance a copy; and that he was of sound and disposing mind and memory at the time of making the same; and that it has not been revoked."[3] In other instances answers to interrogatories have been treated as a special verdict.[4] Of course the finding or verdict must be broad enough to support the decree which rests upon it, and must, in connection with the pleadings and exhibits, contain all the necessary facts.

Sec. 126. **The decree.**— The decree must be framed according to the issues raised and facts found. If the proceeding is in chancery, and the defendant is charged with the receipt of the property devised, which the plaintiff is entitled to under the will, the court may decree payment of the plaintiff's legacy to him according to the terms of the will as established.[5] Thus, where a person was intrusted by the testator with a will and note due by himself, it was held that by the concealment of the will and retention of the note after the testator's death he became an executor *de son tort*, and was liable to be proceeded against by the legatees under the concealed will; by accepting the custody of the will he became trustee in an express trust as to it, and by dealing with the estate he became as to it a trustee by construction. It was so decreed.[6] In New York, under the old practice, the decree in chancery establishing the will was sufficient to authorize the surrogate court to

[1] Skeggs v. Horton, 82 Ala. 352 (1887); S. C. 2 So. Rep. 110.

[2] Morris v. Swaney, *supra*. See finding in Sugden case, § 127.

[3] Apperson v. Cottrell, 3 Port. (Ala.) 51 (1836); S. C. 29 Am. Dec. 239.

[4] Timon v. Claffy, 45 Barb. 438 (1865).

[5] Adams v. Adams, 22 Vt. 50 (1849).

[6] Clarke v. Goodrum, 61 Miss. 731 (1884).

record the decree and issue letters of administration thereon.[1] It is a very common practice, where the will is lost, to grant letters of administration until the will is found;[2] and if its contents are established, until a more authentic copy can be brought into the probate court.[3] The decree should set forth the contents of the will, that it was duly executed by the testator, and by whom attested, as required by law, if known, and if not, by two lawful witnesses whose names are unknown; that the testator was of sound mind and disposing memory. The decree should also contain a direction that it, including the will so established by it, be recorded in the proper will book, which should be done by recording a copy of the decree of the probate court or a copy of the decree in the chancery court.[4] The substance of the will, as shown by the evidence, must be incorporated in the decree, if probate be granted or it be established.[5] Where the contents are proved by depositions, the usual practice is to order them recorded as evidence of the contents of the will.[6]

SEC. 127. **Examples of decrees.**—"And now, on the motion or petition of the said Jonathan Wright, the executor, the jury having found that the said William Clough, the testator, did, after the execution of his said will, duly make and publish a codicil thereto, which said codicil was afterwards fraudulently torn off and destroyed; and the paper writing in the cause marked A having been propounded as a true and exact copy of the said codicil, and probate and allowance prayed; and the court having proceeded to take evidence to prove the same paper A to be a true copy of said codicil, and having been satisfied thereof:

[1] Everitt v. Everitt, 41 Barb. 385 (1864).

[2] Goods of Hilliard, 26 L. T. 228 (1856).

[3] McBeth v. McBeth, 11 Ala. 596 (1847); Coote's Prob. Prac. 122 (17th Eng. ed.).

[4] Dower v. Seeds, 28 W. Va. 113 (1886); 57 Am. Rep. 646.

[5] McNally v. Brown, 5 Redf. 372 (1882).

[6] Sinclair's Will, 5 Ohio St. 290 (1855); Clark v. Wright, 3 Pick. 67 (1825). See section 127 for the decree in this case.

It is therefore ordered, adjudged and decreed that the said decree of the judge of probate, appealed from in this cause, allowing the said instrument as and for the will of the said William Clough, be and the same is hereby affirmed. And it is further ordered, adjudged and decreed that the said codicil, as written and expressed in the said paper marked A, be and the same is hereby received, approved and allowed as and for a codicil to the said will of the said William Clough, deceased; and that an examined copy of this decree, together with the original will as proved and allowed by the judge of probate for the county of Suffolk, and the codicil proved and allowed as aforesaid in this court, be remitted to the said judge, that he may further proceed in the premises according to law."[1] In Sugden's Case the following entry, so far as applicable to the discussion here, was made: "This court doth order that the declaration filed in this cause be amended, and, the same having been amended at the sitting of the court, this court doth find that the Right Honorable Edward Burtenshaw, Lord St. Leonards, the deceased in this cause, made and duly executed his last will and testament, bearing date on or about the 13th of January, 1870, and that the contents thereof were in substance or to the effect set forth in the third paragraph of the declaration as amended; and that the said deceased also made and duly executed eight codicils to the said will" (mentioning their dates), "the said wills and codicils having been propounded in this cause on behalf of the plaintiffs, the executors therein named, and that the said will and codicils were not, nor were either [any] of them, revoked at the death of the said deceased." The decree was as follows: "On the application on behalf of the plaintiffs for a decree, this court doth pronounce and decree for the force and validity of the last will and testament of the Right Honorable Edward Burtenshaw, Lord St. Leonards, the deceased in this cause, bearing date on or about the 13th of January, 1870, and for the contents thereof as in substance

[1] Clark v. Wright, 3 Pick. 67 (1825).

or in effect set forth in the third paragraph, as amended, of the declaration filed in the cause on behalf of the plaintiffs, and also for the force and validity of the eight codicils to the said will."[1] In Gaines' Appeal the decree was as follows: "It is ordered, adjudged and decreed that the will of Daniel Clark, dated New Orleans, July 13, 1813, as set forth in plaintiff's petition, be recognized as his last will and testament, and the same is ordered to be received, recorded and executed as such; and it is further ordered that Francois Dusuan De la Croix be confirmed as testamentary executor of said last will and testament, and that letters testamentary issue to the said De la Croix, and that the costs of this proceeding be borne by the succession."[2]

Sec. 128. **Decree in probate in solemn form.**— The probate of a lost will is in solemn form. Thus, of such a probate, it has been said: "The probate of a will in common form only requires the testimony of a single witness, and is without notice to any one. Probate in solemn form is with notice, and by all the witnesses in existence and within the jurisdiction of the court, or by proof of their signatures and that of the testator, if the witnesses be dead. To establish a lost will the law requires that a copy of the same, clearly proved to be such by the subscribing witnesses and other evidence, shall be produced before it is admitted to probate and recorded in lieu of the original. If the subscribing witnesses are all to be produced, as herein provided [by statute], then it follows that the probate can only be made as it is made in solemn form, and no will can be proved in solemn form with less than the whole number of witnesses if they are to be had."[3] The decree has the same effect as if the will had not been lost; and a failure

[1] Sugden v. Lord St. Leonards, L. R. 1 P. D. 154 (1876); S. C. 34 L. T. (N. S.) 372; 24 W. R. 479; 45 L. J. (P. & D.) 49; 17 Moak, 453.

[2] 11 La. 124 (1855); S. C. 4 Am. L. Reg. 364. See the elaborate decree set out in Buchanan v. Matlock, 8 Humph. 390 (1847); S. C. 47 Am. Dec. 630, in which, after the usual finding, the entire will, in substance, is set out at length.

[3] Mosely v. Carr, 70 Geo. 333 (1883).

to state that it had been lost or destroyed subsequent to the death of the testator (where a will destroyed before could not be probated at all) was held immaterial.[1]

SEC. 129. **Innocent purchaser.**—If the court admitting the will to probate had no power to do so, all sales under the will are void.[2] It is axiomatic that if letters of administration are granted, and the administrator proceeds according to law to sell and dispose of the property of the estate, distributing it to the heirs, he having no knowledge of the lost will, the sales are valid and he is protected; but the heirs at law are liable to refund to the legatee or devisee under the lost will when it is probated or established.[3]

A statute provided that "the title of a purchaser in good faith and for a valuable consideration from the heirs at law of any person who shall have died seized of real estate shall not be defeated or impaired by virtue of any devise made by such person of the real estate so purchased unless the will or codicil containing such devise shall have been duly proved as a will of real estate, and recorded in the office of the surrogate having jurisdiction, or of the register of the court of chancery where the jurisdiction shall belong to that court, within four years after the death of the testator, except: 1. Where the devisee shall have been within the age of twenty-one years, or insane, or imprisoned, or a married woman, or out of the state at the time of the death of such testator. Or, 2. Where it shall appear that the will or codicil containing such devise shall have been concealed by the heirs of such testator or some one of them. In which several cases the limitation contained in this section shall not commence until after the expiration of one year from the time when such disability shall have been removed, or such will or codicil shall have been delivered to the devisee or his representative or to the proper surrogate." A testator

[1] Converse v. Starr, 23 Ohio St. 491 (1872).

[2] Waggoner v. Lyles, 29 Ark. 47 (1874).

[3] Gaines v. Hennen, 24 How. 553 (1860); Gaines v. New Orleans, 6 Wall. 642 (1867); Davis v. Gaines, 104 U. S. 386 (1881).

died February 5, 1836, and his son and heir concealed, in 1841, the will until 1855. In the meantime, on application to a court of chancery by the heirs at law, the land was sold to a *bona fide* purchaser June 1, 1842. He took it with no notice of the concealed will. This purchaser's grantee (who could avail himself of his grantor's equitable rights) claimed to hold the land under the clause protecting such purchaser, viz.: "Where it shall appear that the will or codicil containing such devise shall have been concealed by the heirs of such testator or some one of them;" in which case the limitation providing for those under disabilities did not commence until after the expiration of one year from the time when such disability had been removed, or such will or codicil delivered to the devisee or his representative or to the proper surrogate. It was held that the "concealment" referred to had "reference to a concealment at the time of or succeeding the decease of the testator; a concealment of the instrument from the devisees by one heir, by depriving them of knowledge of its existence;" that the exception had "no application to a case where the will has come to the knowledge or possession of the devisees or of those representing them, and is afterwards stolen or taken from them surreptitiously and secreted or destroyed;" that this exception was intended for a case of concealment which should leave the devisees in ignorance of the will and of their rights under it. But it appeared that the mother, who was also a devisee under the will, had the will in her possession as late as 1841, when this son and heir stole it. Under these facts it was held that this statute touching concealment did not apply; that neither the mother, the son, nor two children who respectively became of age October 13, 1844, and June 26, 1847, could claim under this will as against the *bona fide* purchasers. And it was further held that the proceedings in chancery by these minors' next friend to sell this land for their benefit, and the resultant sale, passed all the title they had, they with their mother and recalcitrant brother being devisees, but in shares dif-

ferent from that cast by the law of descent under this will.[1]

SEC. 130. **Costs.**— The costs of setting up the will are usually taxed to the estate;[2] especially if a reasonable doubt exists whether a will was lost or not.[3] But where the eldest son tore it up he was amerced in costs;[4] and the same was done where the widow tore it up.[5] Where the executrix lost the will she had to pay all the costs incurred by the defendants, and recovered only such costs as she would have incurred in proving the original will.[6] If the proponent is unsuccessful he must pay all the costs, and each defendant may recover his counsel fees under the usual statute allowing the successful party an attorney's fee, as each has a right to counsel.[7] Where letters were improvidently issued they were set aside and costs taxed to the estate.[8] If the will has been spoliated or suppressed, the devisees, after it is established, may maintain an action against the spoliator or suppressor for damages, including their attorneys' fees expended in procuring its probate.[9]

[1] Cole v. Gourlay, 9 Hun, 493 (1877).

[2] Everitt v. Everitt, 41 Barb. 385 (1864); Gaines' Appeal, 11 La. 134 (1855); S. C. 4 Am. L. Reg. 364; Buchanan v. Matlock, 8 Humph. 390 (1847); S. C. 47 Am. Dec. 630.

[3] Bessy v. Bostwick, 14 Gr. Ch. (U. P.) 246 (1868).

[4] Foster v. Foster, 1 Add. 462 (1823).

[5] Martin v. Laking, 1 Hagg. 244 (1828).

[6] Burls v. Burls, L. R. 1 P. & D. 472 (1868).

[7] Collyer v. Collyer, 4 Dem. 53 (1886); S. C. 17 Abb. N. C. 328; Lillie v. Lillie, 3 Hagg. 185 (1829) (costs).

[8] Wyckoff v. Wyckoff, 1 C. E. Gr. 401 (1863).

[9] 1 Cir. Ct. Rep. (Ohio) 95.

APPENDIX A.

The following forms are taken from Coote's Probate Practice:

No. 1.

PROVING DRAFT.

I, A. B., of ——, make oath and say that the said C. D., late of ——, died at —— on the —— day of ——, 18—, having made and duly executed his last will and testament, bearing date the —— day of ——, 18—.

And I further say that since the death of the said deceased the said will has been lost or so mislaid that it cannot now be found.

And I further say that the said will was prepared from the draft thereof now remaining in the registry of this court, and that there is no authentic copy of the said will.

And I further say that on the —— day of ——. 18—, the right honorable judge of this court pronounced for the force and validity of the said will as contained in the said draft, and decreed probate of the said will to be granted and committed to me as the sole executor therein named, limited administration until the original will or an authentic copy thereof be brought into and left in the registry of this court.

And I further make oath that I believe the said paper writing now hereunto annexed and marked by me to contain the true last will and testament (the same being the original draft thereof) of the said testator; that I [am the sole executor therein named, and that I will well and faithfully administer the personal estate and effects of the said testator until the said original will or an authenticated copy thereof shall be brought in and left in the principal register of this court by paying his just debts and the legacies contained in his will so far as the same shall thereto extend and the law bind me; that I will exhibit a true and perfect inventory of all and singular the said estate and effects, and render a just and true account thereof whenever required by law so to do; and that the whole of the personal estate and effects of the said testator does not amount in value to the sum of £—— to the best of my knowledge, information and belief].

[*Jurat.*]

No. 2.

OATH PROVING COPY WHEN THE ORIGINAL IS LOST.

I, A. B., of ——, make oath and say that the said C. D., late of ——, died at —— on the —— day of ——, 18—, having made and duly executed his last will and testament bearing date the —— day of ——, 18—.

And I further make oath and say that at the time of the death of the said deceased the said will was whole and unrevoked, and in the same state as when executed, but that the said will has since been lost, or so mislaid that the same cannot be found.

And I further make oath and say that shortly before the death of the said deceased a copy of the said will was made by —— ——, of ——, at the request of the said C. D., and the same was by him examined with the original and found to agree therewith.

And I further make oath and say that I believe the paper writing hereto annexed and marked by me to contain the true last will and testament (the same being the aforesaid copy thereof) of the said testator; that I am the same executor named in said will; that I [*Conclude by adding the matter contained in the brackets of No. 1*].

[*Jurat.*]

No. 3.

OATH PROVING SUBSTANCE OR CONTENTS OF A WILL.

I, A. B., of ——, make oath and say that the said C. D., late of ——, died at —— on the —— day of ——, 18—, having made and duly executed his last will and testament, bearing date the —— day of ——, 18—.

And I further make oath and say that after the date and execution of the said will the same was deposited by the said deceased in his writing-desk, and remained therein till the —— day of ——, 18—, when the said deceased abandoned his then residence at ——, and left in such residence his said writing-desk with other property and effects belonging to him, and notwithstanding diligent search and inquiry have since been made for such writing-desk and original will the same cannot be found and are believed to be irrevocably lost or destroyed.

And I further make oath and say that the said testator died without having altered or revoked his said will, and that on the —— day of ——, 18—, the right honorable judge of this court, on motion of counsel, decreed probate of the substance of said will of the said deceased as contained in an affidavit duly made and sworn to by E. F., of ——, to be granted to me, until the said original will or an authentic copy thereof be brought into and left in the registry of this court.

And I further make oath and say that I believe the paper writing or affidavit hereto annexed and marked by me to contain the substance of the said true and original will and testament of the said deceased, and that I am the lawful relict of the deceased and the sole executrix therein named; that I [*Conclude with the matter inclosed in the brackets of No. 1*].

[*Jurat.*]

APPENDIX B.

The following extract is from Coote's Probate Practice, which may be found of use to the profession:

When an original will has been lost or mislaid since the testator's death, but a true copy has been made, the executor may take probate of such copy, limited until the original or an authentic copy be brought into the registry.

But he must produce by affidavit that the original was duly executed; that it was in existence after the testator's death, and has been since lost, and that the copy is a true one.

Under some circumstances he must also advertise for the recovery of the lost will or codicil. The form of advertisement is not settled by the registrar.

The directions of the latter, however, are taken as to the newspapers in which the advertisement shall be inserted, and also as to the number of the insertions. The advertisement is usually inserted in two newspapers. If the will or codicil have been lost in the country the advertisement is inserted in a country newspaper and in the "Times" (London) newspaper; otherwise it will be inserted in the "Times" and another London newspaper. The advertisement may appear simultaneously or at intervals.

If the original will or codicil be not recovered by these means, the practitioner inserting the advertisement will make an affidavit to that effect.

No consent on the part of the next of kin of the ancestor is required.

Where no copy of the will has been made, but the draft of it only can be produced, the case, though otherwise the same as that before referred to, is differently considered in one respect.

In order to entitle the court to deal with it on motion, the consent of all the next of kin must be obtained.[1]

If this consent be not given, the draft must be propounded in a suit instituted for that purpose.[2]

When an original will has been lost or destroyed after a testator's death, or has been destroyed in his life-time, by another person without his consent, or by himself without intention, and no draft has been preserved and no copy has been made, with the consent of the next of kin probate may be obtained of its contents, or of its substance and effect, if they can be established by parol evidence.

[1] Barber [Goods of], 1 L. R. P. & D. p. 268; S. C. 36 L. J. R. (N. S.) P. & M. p. 19; Butts [Goods of], 2 Spinks, p. 259.

[2] Burls v. Burls, 36 L. R. (N. S.) P. & M. p. 125; S. C. 1 L. R. P. & D. p. 472.

In all these cases the validity of the execution must be shown as well as the substance of the will.[1]

If a codicil has been similarly lost or destroyed, its contents may be proved in the same manner.

The consent of the residuary legatee under the will will be required. Should there be no residuary legatee, or should the bequest of the residue have lapsed, the next of kin of the testator must consent.

If the executor be the residuary legatee, his application for probate will be an implied consent.

The practice of the court, in its selection of what shall go forth to the world as the exponent of the testator's lost will, has varied.

Sometimes the court has granted probate of an affidavit of scripts (filed in the suit), and at other times of a deposition, or an extract from a deposition of a witness, as containing the contents, or substance, or effect of the lost will or codicil.

If a codicil has been lost since the testator's death without a copy having been made or the draft kept, and its contents or substance cannot be shown, the court will grant probate of the will, limited until the original codicil or an authentic copy thereof shall be brought in.

So if the will has been lost since the death of the testator, and it is impracticable to prove its contents or substance, the court will grant probate of a codicil to that will containing dispositions independent of and referring to it.[2]

When the original will or codicil, or both, are in the possession of a person residing abroad, who has refused or neglected to deliver them up, but a copy has been transmitted to the executor, a probate of such copy will be granted to him on his showing, by affidavit, the manner in which it was transmitted; that a better or more authentic copy does not exist in Great Britain, and that it is essential or necessary for the interests of the estate that probate be forthwith granted without waiting the arrival of the original or a better or more authentic copy.

If the copy has been transmitted to a person other than the executor, he will be required to join the executor in the affidavit.

The affidavit does not go into the execution of the will or codicil, as in the case of lost or destroyed instruments of that nature.

Under the same conditions as before stated, a copy of a will or codicil may be proved.

. . . . . .

If no copy of the will can be produced, and its contents or tenor cannot be substantiated, he may take administration limited until the original or a copy be brought in.[3]

[1] H. C. Gardner [Goods of], 1 Sw. & Tr. p. 110.

[2] Greig [Goods of], 14 W. R. p. 349; 1 L. R. P. & D. p. 72; 35 L. J. R. (N. S.) p. 113.

[3] Coote's Prob. Prac. 122–126 (7th Eng. ed.).

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